153 U.S. 391

153-391

Ob. 43.

RECORD, CASE No. 15,073.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., ~~1103.~~ 768

NORMAN BRASS, PLAINTIFF IN ERROR,

vs.

THE STATE OF NORTH DAKOTA EX REL. LOUIS W. STOESER.

IN ERROR TO THE SECOND JUDICIAL DISTRICT COURT OF RAMSEY COUNTY, STATE OF NORTH DAKOTA.

FILED JULY 2, 1892.

RECORD, CASE No. 15,073.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 1103.

NORMAN BRASS, PLAINTIFF IN ERROR,

vs.

THE STATE OF NORTH DAKOTA EX REL. LOUIS W. STOESER.

IN ERROR TO THE SECOND JUDICIAL DISTRICT COURT OF RAMSEY COUNTY, STATE OF NORTH DAKOTA.

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1 STATE OF NORTH DAKOTA, }
County of Ramsey. }

In District Court, 2nd Judicial District.

STATE OF NORTH DAKOTA *ex Rel.* LOUIS W. STOESER, Relator, }
vs. }
NORMAN BRASS, Respondent. }

The petition of the relator shows to the court—

1. That he is the relator in the above-entitled matter; that he owns and operates a farm consisting of 540 acres in the vicinity of the railroad station of Grand Harbor, in the county and State aforesaid, and during the year 1891 has raised on said farm about 4,000 bushels of grain, principally wheat.

2. That the relator has not sufficient storage capacity on his farm or elsewhere for said grain so raised as aforesaid, but is dependent almost wholly upon the grain elevators and warehouses in the vicinity of said farm for storage capacity.

3. That fully fifty per cent. of the grain raised in Ramsey county, North Dakota, is dependent for storage capacity upon the grain elevators and warehouses at the various towns, villages, and railroad stations in said Ramsey county.

4. That the respondent, Norman Brass, is now and at all the times herein stated has owned and operated a grain elevator at the railroad station of Grand Harbor aforesaid for the purpose of buying, selling, storing, and shipping of grain for profit.

5. That the relator on the 30th day of September, 1891, hauled fifty-eight bushels of wheat to the grain elevator of respondent, Norman Brass, at Grand Harbor aforesaid, and tendered the same at said elevator of said Norman Brass for storage, and requested said Norman Brass to receive, elevate, insure, and store said grain for twenty days, and at the same time tendered to said Brass two cents per bushel for compensation for receiving, elevating,
2 insuring, and storing said grain for twenty days; that said grain when so tendered as aforesaid was dry and in a suitable condition for storage, and there was in said grain elevator of said Brass at Grand Harbor aforesaid at said time storage capacity for over twenty-five thousand bushels of grain not in use and wholly unoccupied.

6. That said Brass then and there refused to receive said grain for the purpose aforesaid and wholly refused to store said grain at said price.

7. That the relator endeavored to secure storage for said grain at the only other elevator in operation at said railroad station of Grand Harbor aforesaid, but said other elevator refused to receive relator's grain upon the same ground as respondent.

8. That the relator is informed and believes that the owners of grain elevators and warehouses within a radius of fifty miles of Grand Harbor aforesaid refuse to receive grain for storage at said price.

9. That relator's grain for want of storage room will be damaged and injured unless the respondent is compelled to perform his duty as a public warehouseman under and pursuant to the provisions of chapter 126 of the Laws of 1891, and other laws of said State relating to the subject of public warehousemen.

10. That the relator is without any speedy or adequate remedy in the ordinary and usual course of law and therefore prays that an alternative writ of mandamus may be issued requiring the respondent, so long as the capacity of his said elevator is sufficient for that purpose, to store such grain as may be tendered to him by the relator in a dry and suitable condition for a compensation not exceeding the following schedule, viz: For receiving, elevating, insuring, delivering, and twenty days storage, two cents per bushel; storage rates after the first twenty days, one-half cent per bushel for each fifteen days or fraction thereof, and shall not exceed five cents for six months, or show cause to the contrary before this court, at the court-house, in the city of Devil's Lake, Ramsey county, North Dakota, on the 5th day of October, 1891, at ten o'clock in the forenoon of said day, why the command of this court contained in said alternative writ has not been complied with and obeyed.

3

JAS. F. O'BRIEN,
Attorney for Petitioner.

STATE OF NORTH DAKOTA, }
County of Ramsey. }

Louis W. Stoeser, being first duly sworn, deposes and says that he is the relator named in the foregoing petition; that he has heard read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

LOUIS W. STOESER.

Subscribed and sworn to before me this 30th day of September, 1891.

[NOTARIAL SEAL.]

JAS. F. O'BRIEN,
Notary Public, Ramsey County, North Dakota.

Indorsement: "Ramsey county, North Dakota. Filed in the office of the clerk of the district court this 3 day October, 1891. (Signed) T. C. Saunders, clerk of dist. court. Jas. F. O'Brien, attorney for petitioner."

4 STATE OF NORTH DAKOTA, }
County of Ramsey. }

In District Court, 2nd Judicial District.

STATE OF NORTH DAKOTA *ex Rel.* LOUIS W. STOESER, Relator, }
vs.
NORMAN BRASS, Respondent. }

The State of North Dakota to Norman Brass, respondent:

Whereas the following facts have been made to appear to this court by the verified petition of the above-named relator, to wit:

1. That he is the relator in the above-entitled matter; that he owns and operates a farm containing 540 acres in the vicinity of the railroad station of Grand Harbor, in the county and State aforesaid, and during the year 1891 has raised on said farm about 4,000 bushels of grain, principally wheat.

2. That the relator has not sufficient storage capacity on his farm or elsewhere for said grain so raised as aforesaid, but is dependent almost wholly upon the grain elevators and warehouses in the vicinity of said farm for storage capacity.

3. That fully fifty per cent. of the grain raised in said Ramsey county, North Dakota, is dependent for storage capacity upon the grain elevators and warehouses at the various towns, villages, and railroad stations in said Ramsey county.

4. That the respondent, Norman Brass, is now and at all times herein stated has owned and operated a grain elevator at the railroad station of Grand Harbor aforesaid for the purpose of buying, selling, storing, and shipping of grain for profit.

5. That the relator on the 30th day of September, 1891, hauled fifty-eight bushels of wheat to the grain elevator of the respondent,
Norman Brass, at Grand Harbor aforesaid, and tendered the
5 same at said elevator of said Norman Brass for storage and requested said Norman Brass to receive, elevate, and store said grain for twenty days, and at the same time tendered to said Brass two cents per bushel for compensation for receiving, elevating, insuring, and storing said grain for twenty days; that said grain when so tendered as aforesaid was dry and in a suitable condition for storage, and there was in said grain elevator of said Brass at Grand Harbor aforesaid, at said time, storage capacity for over twenty-five thousand bushels of grain not in use and wholly unoccupied.

6. That said Brass then and there refused to receive said grain for the purpose aforesaid, and wholly refused to store said grain at said price.

7. That the relator endeavored to secure storage for said grain at the only other elevator in operation at said railroad station of Grand Harbor aforesaid; but said elevator refused to receive relator's grain upon the same ground as respondent.

8. That the relator is informed and believes that the owners of grain elevators and warehouses within a radius of fifty miles of Grand Harbor aforesaid refuse to receive grain for storage at said price.

Now, therefore, this court, in order that justice may be done in this behalf to him, Louis W. Stoeser, relator, does hereby command and enjoin you that immediately upon receipt of this writ you do receive from relator, while your storage capacity at your elevator herein mentioned is sufficient for that purpose, all grain that may be tendered to you by the relator in a dry and suitable condition for storage at a rate of compensation not exceeding the following schedule, viz: For receiving, elevating, insuring, delivering, and twenty days storage, two cents per bushel; storage rates after the first twenty days, one-half cent per bushel for each fifteen days
6 or fraction thereof, and shall not exceed five cents for six months, or that you show cause to the contrary before this court, at the court-house, in the city of Devil's Lake, Ramsey county, North Dakota, on the 5th day, of October, 1891, at 10 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, and how you have executed this writ make known to this court at the time and place aforesaid, and have you then and there this writ.

Dated Sept. 30th, 1891.

(Signed) D. E. MORGAN,
Judge District Court Ramsey County, North Dakota.

STATE OF NORTH DAKOTA, }
County of Ramsey, } *ss:*

I hereby certify and return that I did on the 2nd day of October, 1891, at the city of Devil's Lake, in said county and State, serve the within petition and writ of mandamus upon the within-named respondent, Norman Brass, personally by handing to and leaving with him true and correct copies thereof.

Dated October 2nd, 1891.

My fees, $4.60.

EVER. WAGNESS,
Sheriff of Ramsey County, North Dakota.

(Indorsements:) 512. Ramsey county, North Dakota. Filed in the office of the clerk of district court this 3 day of October, 1891. T. C. Saunders, clerk of dist. court.

7 STATE OF NORTH DAKOTA, }
County of Ramsey. }

District Court, Second Judicial District.

STATE OF NORTH DAKOTA *ex Rel.* LOUIS W. STOESER, Relator, }
vs. }
NORMAN BRASS, Respondent. }

The return of the respondent to the alternative writ of mandamus issued in the above-entitled proceeding shows to the court—

I.

That the respondent admits the truth of the facts pleaded in said alternative writ.

II.

For a further return to the said alternative writ the respondent alleges that he owns and operates only one grain elevator in North Dakota or elsewhere; that the said elevator is the elevator mentioned in said alternative writ, and is situated at Grand Harbor, a small way station on the line of the Great Northern railroad, containing a population of less than one hundred people; that there are two other elevators owned and located at said station of Grand Harbor; that said elevators are owned and operated by different owners independently of and in competition with each other; that there are about six hundred grain elevators, flat-houses, and warehouses in said State of North Dakota at which grain is bought and shipped for profit, which said elevators, warehouses, and flat-houses are owned and operated by over one hundred and twenty-five different owners independent of and in competition with each other; that the owners of said elevators, warehouses, and flat-houses are individuals engaged in buying and shipping grain, millers who use their elevators to supply their mills with grain, farmers' shipping associations, elevator corporations, and individual farmers; that said elevators, flat-houses, and warehouses vary in cost of construction from five hundred dollars to five thousand dollars, and vary in capacity from five thousand to fifty thousand bushels; that there are from two to ten elevators, warehouses and flat-houses operated and owned, each by different owners and operators, at every station in North Dakota at which grain is marketed; that land upon which it is practicable to erect other elevators at every station in North Dakota at which grain is marketed is unlimited in area and can be readily purchased at prices varying from one dollar and twenty-five cents per acre to forty dollars per acre; that respondent's said elevator cost when constructed and fully equipped about three thousand dollars; that the capacity of the same is about 30,000 bushels.

That respondent's principal business is that of buying wheat at Grand Harbor, North Dakota, and shipping the same to and selling it at Minneapolis and Duluth, Minnesota, to which the business of storing grain for third persons is and always has been a mere incident.

That all grain purchased by respondent at his said elevator is purchased for the sole purpose of being shipped to and sold at and is shipped to and sold at Minneapolis and Duluth, Minnesota.

That respondent in the conduct of his said business contracts with millers and other purchasers of grain at said Minneapolis and Duluth to sell and deliver to said persons at a future and fixed date certain quantities of wheat, and operates and maintains his said elevator for the exclusive purpose of purchasing grain to fill said contracts.

That in seasons when the grain yield is light and railroad facilities are such as to enable grain to be moved rapidly there is
9 space and storage capacity in respondent's elevator in excess of that used by respondent's grain, and particularly when respondent's contracts for the sale of grain are small, while at other times when the yield is enormous, as in the present year, respondent's contracts large, and the quantities of grain presented for shipment are beyond the capacity of the railroads to move, there is not sufficient storage capacity in respondent's elevator to hold and store the grain purchased by respondent in the conduct of his said business.

That there are located in Minneapolis and Duluth, Minnesota, a great number of corporations, persons, and copartnerships engaged in a business known as the grain commission business.

That these grain commission houses have swarms of agents travelling throughout the State of North Dakota, going from town to town and farm to farm, purchasing grain from farmers in some instances and in others soliciting farmers to ship their grain to said houses at Minneapolis or Duluth, Minnesota, to be by the latter sold on commission.

That none of said grain commission houses have or own any storage capacity in North Dakota.

That if chapter 126 of the Laws of 1891 is valid and its effect is to compel respondent to receive all grain that may be tendered to him for storage by grain commission men, farmers, grain speculators, and others without reference to the necessities or condition of respondent's business at any particular time, the entire storage capacity of respondent's elevator will be exhausted in storing grain for third persons, and the principal business of respondent, to conduct which his capital was invested in said elevator, will be utterly ruined and annihilated for want of storage capacity to contain wheat purchased by him to fill contracts made by him in the conduct of his said business and respondent subjected to suits for damages for non-fulfilment of his said contracts.

10 That relator only offered to pay respondent for the service which he requested him to perform the rate fixed by chapter 126 of the Laws of 1891—that is, two cents per bushel; that respondent refused to perform the service for less than two and one-half cents per bushel.

That respondent refuses to comply with the provisions of said chapter 126 on the ground that it abridges his privileges and immunities as a citizen of the United States; that it deprives him of his liberty and property without due process of law and denies to him the equal protection of the laws and amounts to a regulation of commerce among the States.

That for thirteen years last past the rate charged for the storage of grain has been uniform at all elevators, flat-houses, and warehouses in North Dakota, and during that time did not exceed the following schedule: For receiving, elevating, insuring, delivering, and fifteen days' storage, two and one-half cents per bushel; after the first fifteen days, one-half cent per bushel for each fifteen

days or part thereof, but not to exceed five cents per bushel for six months.

That the average farm in North Dakota does not exceed in area 160 acres; that the average yield in grain of a quarter section of land in North Dakota does not exceed twenty-five hundred bushels; that a granary sufficient in size to safely and securely store twenty-five hundred bushels of grain can be erected on any farm in North Dakota at a cost not exceeding one hundred and fifty dollars.

That the business of respondent and all other persons, firms, and corporations engaged in the business of operating grain elevators, warehouses, and flat-houses in North Dakota and the manner in which said business is conducted is not in any manner unwholesome or deleterious to the health, morals, welfare, or safety of
11 the community or society.

That the railroad and warehouse commissioners of North Dakota, on page 33 of their annual report to the governor for 1890, said: "In view of the fact that after thorough investigation the board deem the charges allowed by section 22, chapter 187 (Laws of 1890), and also section 10 of said chapter, as unreasonable, the following rules of storage are recommended:

1. For receiving, elevating, insuring, delivering, and fifteen days' storage, two and one-half cents per bushel.

2. After fifteen days, one-half cent per bushel for each fifteen days or part thereof, but not to exceed five cents for six months."

That the rates referred to by said commissioners as unreasonable were less than the rate recommended by said board.

That respondent denies that the legislature has any power whatever to say whether he shall rent the bins in his elevator or not and wholly denies the power of the legislature to say what he shall charge for the use of his said elevator or the bins therein.

That since the enactment of section nine of chapter 126 of the Laws of 1885 the amount of grain shipped directly by farmers without the intervention of elevators, warehouses, or flat-houses has been increasing, and in 1890, as respondent is informed and believes, nearly fifty per cent. of the entire grain product of North Dakota was shipped to Minneapolis and Duluth, Minnesota, by farmers; that the amount of grain shipped in that manner is steadily increasing from year to year.

That pursuant to section 7 of chapter 122, Laws of 1890, the railroad commissioners adopted and published the following rules to govern the distribution of cars and other freight, which rules are now in operation in said State of North Dakota, to wit:

"STATE OF NORTH DAKOTA:

12 OFFICE OF COMMISSIONERS OF RAILROADS.

Rules for Distribution of Cars Between Stations and Shippers.

I. In distributing cars to stations for grain-loading they shall be distributed according to the daily average shipments from such stations.

II. In distributing cars to shippers for grain-loading at stations agents shall first fill each shipper's order for one car to each. After this is done the balance of the cars shall be distributed among shippers according to the amount of grain in sight offered for shipment by each shipper.

III. Parties desiring to load grain on track shall be furnished cars and shall be allowed for loading time twenty-four hours from the time the car is set on the side track to complete loading and furnish shipping directions. In case shipper fails to complete loading or furnish shipping directions within twenty-four hours, then in such case the railway company may collect upon such cars $3.00 rental for each and every day or part of a day which such cars are delayed after twenty-four hours.

The above rule as to time and rental charges shall also apply to grain delayed in unloading on track."

In connection with the rules in said report said commissioners said: "We believe that the railroads have labored faithfully to supply cars to shippers in accordance with these rules, and, so far as their ability to supply the demand permitted, cars have been distributed in conformity therewith. From September 15th to December 15th the demand for cars is double the ability of the roads to supply, and as a necessary consequence delay in supplying cars must ensue. In all cases of complaint as to failure to get cars investigated this year this has been the case, and cars have been supplied as soon as possible by the railroad companies.

13 The liberal policy of the railroads in the distribution of cars adopted this year has been of great benefit to the farmers of North Dakota."

Wherefore the respondent demands judgment quashing the alternative writ of mandamus, dismissing this proceeding, and for his costs and disbursements laid out and expended in this action.

Dated this 5th day of October, 1891.

JOHN W. MAHER,
Attorney for Respondent.

STATE OF NORTH DAKOTA, }
County of Ramsey. }

John W. Maher, being first duly sworn, says that he is the attorney for the respondent in the above-entitled proceeding; that he has read the foregoing return and answer to said alternative writ and knows the contents thereof; that the same is true, to the best of his knowledge, information, and belief; that the reason this verification is not made by the respondent is that he is absent from the county of Ramsey aforesaid, wherein this affiant resides.

JOHN W. MAHER.

Subscribed and sworn to before me this 5th day of October, 1891.

E. T. MOEN, [NOTARIAL SEAL.]
Notary Public, Ramsey County, North Dakota.

(Indorsements:) "Ramsey county, North Dakota. Filed in the office of the clerk of district court this 5 day of Oct., 1891. T. C. Saunders, clerk of dist. court." "Due service of copy admitted this 5th day of October, 1891. Jas. F. O'Brien, att'y for relator."

14 STATE OF NORTH DAKOTA, }
County of Ramsey. }

District Court, Second Judicial District.

STATE OF NORTH DAKOTA *ex Rel.* LOUIS W. STOESER, Relator, }
vs. }
NORMAN BRASS, Respondent. }

It is hereby stipulated by and between the undersigned, attorneys for the above-entitled parties, that the annexed copy of the rules and regulations for the inspection of grain and government of public warehouses of the State of North Dakota, adopted by the commissioners of railroads August 1st, 1891, may be considered a part of the return and read and considered on the argument and trial of the above-entitled action by the supreme court of North Dakota.

Dated October 5th, 1891.

JAS. F. O'BRIEN,
Attorney for Relator.
JOHN W. MAHER,
Attorney for Respondent.

On reading and filing the stipulation above set forth it is ordered that the annexed rules and regulations for the inspection of grain and government of public warehouses for the State of North Dakota, adopted by the commissioners of railroads August 1st, 1891, may be returned as part of the record herein.

Dated October 5th, 1891.

D. E. MORGAN,
District Judge.

Attest: T. C. SAUNDERS, *Clerk.*

[Seal of Dist. Court, Ramsey Co., N. D.]

(Endorsed:) Ramsey county, North Dakota. Filed in the office of the clerk of district court this 7th day of October, 1891. T. C. Saunders, clerk of dist. court. Filed in the clerk's office, supreme court, State of North Dakota, Oct. 27, 1891. R. D. Hoskins, clerk.

15 *Rules and Regulations for the Inspection of Grain and Government of Public Warehouses of the State of North Dakota, Adopted by the Commissioners of Railroads August* 1, 1891.

16 Rules and regulations for the inspection of grain and government of public warehouses of the State of North Dakota, adopted by the commissioners of railroads August 1, 1891.

17 *Rules and Regulations Adopted by the Commissioners of Railroads for the Government of Public Warehouses, Adopted August* 1, 1891.

Rule I.

By an act of the Legislative Assembly of the State of North Dakota approved March 7, 1891, it is made the duty of the "railroad commissioners of the State of North Dakota to supervise the handling, weighing, and storage of grain and seeds; to establish all necessary rules and regulations for the weighing of grain and for the management of the public warehouses of the State, as far as such rules and regulations may be necessary to enforce the provisions of that act or any law in this State in regard to same; to investigate all complaints of fraud or oppression in the grain trade of this State and correct the same as far as it may be in their power."

Rule II.

All buildings, elevators, or warehouses in this State erected or operated by any person or persons, association, copartnership, corporation, or trust for the purpose of buying, selling, storing, shipping, or handling grain for profit are hereby declared public warehouses.

Rule III.

Any person or persons, association, copartnership, corporation, or trust owning or operating any such building or buildings,
18 elevator or elevators, warehouse or warehouses, as designated in rule 2, which are now or may hereafter be located or doing business within this State, whether said owners or operators reside within the State or not, are public warehousemen.

Rule IV.

Public warehousemen shall not permit discrimination with reference to the buying, receiving, and handling of grain of standard grades or in regard to parties offering such grain for sale, storage, or handling at such public warehouse.

Rule V.

The proprietor, lessee, or manager of any public warehouse or elevator doing business in this State shall file with the commis-

sioners of railroads of the State a bond running to the State of North Dakota, with good and sufficient sureties, to be approved by said commissioners of railroads, in the penal sum of $5,000 for one warehouse or elevator, and in the penal sum of $15,000 where one party, firm, or corporation own and operate more than one warehouse or elevator and not to exceed ten such warehouses or elevators, and in the penal sum of $25,000 where one party, firm, or corporation own or operate more than ten such warehouses or elevators, said bond conditioned for the faithful performance of duty as public warehousemen, to protect holders of outstanding tickets, and a compliance with all the laws of the State in relation thereto, said bond also specifying the location of each elevator or warehouse operated by said individual, firm, corporation, or trust.

Rule VI.

Warehousemen at each and every warehouse or elevator owned or operated by them within the State shall duly inspect, grade, and properly weigh all grain received by them either for storage or by purchase, and shall at once notify the party offering the same for storage or sale the grade of the grain so offered, the gross weight and the amount of dockage per bushel if the grain is unclean, together with the market price of such grain for that day in Minneapolis or Duluth, Minn.

19 Rule VII.

After the inspection should any party interested in said lot of grain feel himself aggrieved at such inspection, weight, or dockage, he shall then and there object to the same to the warehouseman, stating his objections specifically, and if the disagreement cannot be amicably settled between the party aggrieved and the warehouseman, then and in that event the party aggrieved and warehouseman jointly shall thereupon sack and properly seal one-half bushel of such grain, inserting a slip in the top of the sack stating the points of disagreement, and the party aggrieved shall immediately forward the same, prepaid, to the nearest commissioner of railroads, who will, at his earliest convenience, render a decision and determine the grade of the grain in dispute; which decision shall be final and binding upon all parties.

In case such appeal is not taken before the grain in dispute shall have lost its identity, then the right of appeal shall be deemed waived and no longer exist.

The warehouseman has the option of refusing to receive grain should the party offering the same be not satisfied.

Rule VIII.

Warehouse receipts must be issued upon the application of the owner or consignor for all grain received into such warehouse, which receipt shall state the date grain is received, the quality and grade, the weight in gross, and the dockage for dirt, if uncleaned; said re-

ceipt shall be consecutively numbered and no two receipts bearing the same number and series shall be issued the same year.

Rule IX.

Warehousemen shall issue storage receipts to each and every person storing grain with them, which receipt shall provide by express agreement that at the option of the original holder of such receipt the kind, quality, and quantity of grain for which such receipt was issued shall be delivered back to him at the same place where it was received upon the payment of a reasonable charge per bushel for receiving, handling, storing, and insurance charges, such charges to be fixed by express terms in the storage receipt at the time of receiving the grain at the elevator or warehouse, and at the time of issuing the receipt: Provided that no charges shall be made for cleaning grain unless such grain shall be actually cleaned; provided, further, that nothing in this rule shall be construed to mean the delivery of the identical grain specified in the receipt so presented: but an equal amount of the same grade, excepting in case of wheat placed in "special bin."

Rule X.

Upon return of any receipt properly endorsed by the holder thereof and the tender of all proper charges, the grain represented by said receipt is immediately deliverable in receptacle to be provided by the holder of the receipt and not subject to further charge for storage, and if delivery is not made in the order demanded, and as rapidly as due diligence, care, and prudence will justify, the warehouseman shall be held to be in default: Provided that storage charges shall not cease until cars are furnished by the holder of said receipt.

Rule XI.

Warehousemen are prohibited, under any circumstances, from mixing grain of different grades. Grain of the same grade shall be kept together and stored only with grain of a similar grade, nor shall the warehouseman attempt to deliver grain of one grade for that of another grade, or in any manner whatever tamper with grain in his possession.

Rule XII.

Upon request of any owner of grain the warehouseman may place any grain of same grade belonging to said owner in special bin, apart from grain of other owners; provided the owner of such grain has sufficient grain to properly fill such bin or bins, and provided that there are vacant bins in warehouse when wheat is offered. The warehouse receipt issued in such case shall state on its face "special bin," and state the number of said bin.

Rule XIII.

The commissioners of railroads of this State, or any person designated by them, have the right to enter any public warehouse in this State, to inspect its books, scales, grain, and the method of
21 doing business, and to compel said warehouse to have every facility for the proper transaction of their business under the law.

Rule XIV.

Whenever any grain shall be delivered to any person, association, firm, corporation, or trust doing a grain, warehouse, or grain elevator business in this State, and the receipts issued therefor providing for the delivery of a like amount and grade to the holder thereof in return, such delivery shall be a bailment and not a sale of the grain so delivered, and in no case shall the grain so stored be liable to seizure upon process of any court in action against such bailee, except action by owners of such warehouse receipts to enforce the terms of the same, but such grain shall at any and all times, in the event of the failure or insolvency of such bailee, be first applied exclusively to the redemption of outstanding warehouse receipts for grain so stored with such bailee, and in such event grain on hand in any particular elevator or warehouse shall first be applied to the redemption and satisfaction of receipts issued from such warehouse.

Rule XV.

The several warehouses and elevators doing business in this State as public warehouses are permitted to make the following charges and no more, viz:

For receiving, elevating, insuring, delivering, and twenty days' storage, two cents per bushel.

Storage after the first twenty days, one-half cent for each fifteen days or fraction thereof, and shall not exceed five cents for six months.

The grain stored shall be insured at the expense of the warehouseman for the benefit of the owner.

For buying, receiving, elevating, insuring, shipping, inspection in North Dakota, transfer charges, commissions, and all other legitimate charges, not to exceed four cents per bushel and fractions as per rule 18.

Any farmer selling his storage tickets to elevator company within twenty days after their date shall pay no storage.

22 Rule XVI.

Every warehouseman doing business as a public warehouseman shall cause to be kept in each and every warehouse or elevator under his charge a blank book, properly ruled, which shall be designated "wheat register," in which shall be entered in ink—

First. Date of receipt of any grain.

Second. From whom such grain is received.

Third. The grade.
Fourth. The gross weight.
Fifth. The weight of dockage for dirt.
Sixth. The net weight of grain when docked.
Seventh. The price paid per bushel.
Eighth. A column for remarks: "Stored," if stored; "purchased," if purchased; "appealed," if appealed from decision of warehouseman, or any other remarks that may be pertinent to the subject.

Rule XVII.

The warehouseman of each warehouse or elevator shall, at the close of each business day, make out a detailed report (upon blanks furnished by the commissioners of railroads) showing the gross number of bushels of grain of the several grades received during the day, the number of bushels of dockage on same, the price paid per bushel on same, and, if any cars have been shipped out, the number and initial of each car, the number of bushels in each car, and the grade of grain therein, to whom and to what point consigned; which report shall be certified to as being correct and duly signed by the warehouseman and forwarded by mail to the commissioner of railroads within the grain district as provided in rule 19.

Rule XVIII.

Each elevatorcompany operating in this State shall furnish to the commissioners of railroads a daily report of the prices to be paid each day at every elevator operated by them, which price shall be based upon the Minneapolis price at which the wheat purchased can be sold and delivered of the day before, deducting freight from
23 the station to Minneapolis, and not to exceed four (4) cents (and fractions) per bushel for all costs for handling the same. Notice to agent of changes of price shall be posted in a conspicuous place in each elevator.

Rule XIX.

For the better accommodation of the public during the fall months of the year when the bulk of the grain of the State is being moved, the board deem it for the best interest of the State that there should be one of their number stationed at such convenient points as will be most accessible to the greatest number, and to that end one of said commissioners will be located at Grand Forks, one at Wahpeton, one at Fargo, and the secretary of the board will remain at Bismarck, where monthly meetings will be held on the first Tuesday in each month. Reports as provided for in rule 17 and appeals provided in rule 7, or any other matter for immediate action by the board at all points on G. N. R. R. from Grand Forks west to Ft. Buford, points on the G. N. R. R. in Traill county, and all points north of the G. N. R. R. running west, as well as upon the N. P. R. R. from Grand Forks to Pembina, shall be forwarded to the commissioner at Grand Forks; all points in Cass except points on main line of N. P. R. R., Barnes, Steele, Richland, Sargent, and Ransom

counties to the commissioner at Wahpeton; all points in Griggs, Stutsman, Foster, Eddy, Wells, and Benson, to Minnewakan, La Moure, Dickey, Kidder, Burleigh, and all counties west of Fargo on main line of N. P. R. R., to the commissioner at Fargo.

Rule XX.

In determining the grade of grain offered for sale or storage at the several warehouses or elevators in this State, warehousemen shall be governed by the following North Dakota grades:

No. 1 hard spring wheat must be sound, bright, and well cleaned, and must be composed mostly of Hard Scotch or Saskatchewan Fife wheat, and weigh not less than fifty-eight pounds to the measured bushel.

No. 1 northern spring wheat must be sound and well cleaned,
24 and must be composed of the hard and soft varieties of spring wheat, not less than fifty per cent. of the hard varieties of spring wheat, and in weight not less than fifty-seven pounds to the measured bushel.

No. 2 northern spring wheat must be sound, reasonably clean, and of good milling quality; to weigh not less than fifty-six pounds to the measured bushel, and to include all wheat not suitable for the higher grades.

No. 3 spring wheat shall comprise all inferior, shrunken, or dirty spring wheat, weighing not less than fifty-four pounds to the measured bushel.

Rejected spring wheat shall include all spring wheat that is grown, badly bleached, or for any cause unfit for No. 3 wheat.

Rule XXI.

The foregoing rules shall be kept posted in a conspicuous place in all the warehouses or elevators in this State doing business as public warehouses.

Rule XXII.

Any person, association, firm, trust, or corporation, or any representative thereof, who shall knowingly cheat or fals-ly weigh any wheat or other agricultural products, or who shall violate any of the foregoing rules or shall do or perform any act or thing therein forbidden, or who shall fail to do and keep the requirements as herein provided, shall be deemed guilty of a misdemeanor (according to an act of the legislature approved March 7th, 1891), and shall on conviction thereof be subject to a fine not less than $200 nor more than $1,000, and be liable in addition thereto to imprisonment for not more than one year in the State penitentiary, at the discretion of the court.

Adopted and approved August 1, 1891.

GEO. H. WALSH, *Chairman.*
GEO. W. HARMON,
ANDREW SLOTTEN,
Commissioners.

Attest: M. J. EDGERLY, *Secretary.*

25 *Rules and Regulations.*

Prescribed by the commissioners of railroads of the State of North Dakota for the administration of the departments of grain inspection and warehouse registration in the State of North Dakota, and to be in force from and after the 15th day of August, 1891.

Rule I.

The commissioners of railroads of the State of North Dakota shall, at their regular monthly meeting in the month of August of every odd-numbered year or as soon thereafter as may be practicable, appoint a suitable person as chief inspector of grain in the State of North Dakota, who shall hold his office for the term of two years, unless sooner removed by said commissioners of railroads, who shall before entering upon the duties of his office take an oath of office as in the case of other State officers, and he shall execute a bond to the State of North Dakota in the penal sum of $10,000, with good and sufficient sureties to be approved by the commissioners of railroads, conditioned that he will faithfully and impartially discharge the duties of the office of chief inspector according to law and the rules and regulations of said commissioners of railroads, and that he will pay all damages to any person or persons who may be injured by reason of his neglect or failure to comply with the law or the rules and regulations aforesaid.

Rule II.

Said chief inspector shall appoint, subject to the approval of the commissioners of railroads, such number of deputy inspect-
26 ors as may be required, one of which deputies in each of the cities of Grand Forks, Fargo, Wahpeton, and Fairmount shall be denominated and styled chief deputy.

Rule III.

Such deputy inspectors shall take a like oath of office to that required from the chief inspector, and shall give a bond to the State of North Dakota in the penal sum of $5,000, with good and sufficient sureties as may be approved by the commissioners of railroads, and conditioned in like manner as the commissioners of railroads require from the chief inspector.

Rule IV.

The bonds given by the chief inspector and the deputy inspectors shall be filed in the office of the secretary of state for the State of North Dakota, and suit may be brought upon said bond or bonds in any court having jurisdiction thereof for the use of the person or persons so injured.

Rule V.

The chief inspector shall have power to remove any of the deputy inspectors at pleasure, and said deputy inspectors shall act under the immediate control and supervision of said chief inspector.

Rule VI.

The chief inspector of grain and all deputy inspectors shall be governed in their respective duties by such rules and regulations as may be provided by the commissioners of railroads, and the said commissioners shall have power to fix the rates of charges for inspection of grain and the manner in which the same shall be collected, and which charges shall be regulated in such manner as will, in the judgment of said commissioners, produce sufficient revenue to meet the necessary expenses of the inspection service and no more. Said commissioners of railroads shall fix the amount of compensation to be paid to the chief inspector and deputy inspectors, and prescribe the time and manner of payment thereof; which compensation shall be paid out of the grain inspection fund hereinafter created on the order of the commissioners of railroads.

27

Rule VII.

No chief inspector or deputy inspector of grain shall, during his term of service, be interested, directly or indirectly, in the handling, storing, shipping, purchasing, or selling of grain, nor shall he be in the employment of any person or corporation interested in the handling, storing, shipping, purchasing, or selling of grain.

Rule VIII.

Upon complaint in writing of any person to the commissioners of railroads, supported by reasonable and satisfactory proof, that the chief inspector or any of his deputies have violated any of the rules prescribed for his government, or has been guilty of any improper official act or has been found inefficient or incompetent for the duties of his position, said person shall be, by said commissioners of railroads, immediately removed from office.

Rule IX.

Any duly authorized inspector or deputy inspector of grain who shall be guilty of any neglect of duty or who shall accept any money or other consideration, directly or indirectly, for any neglect of duty or any improper performance of any duty as such inspector of grain, or any person who shall improperly influence any inspector of grain in the performance of his duty as such inspector, is by the provisions of section 31, chapter 188, Laws of 1890, deemed guilty of a misdemeanor.

(The attention of all employés of the inspection and registration departments is particularly called to sections 29, 30, and 31 of chapter 188, Session Laws of 1890.)

Rule X.

The charge for the inspection and weighing of grain shall be and constitute a lien on grain so inspected, and whenever such grain is in transit the said charges shall be treated as advance charges, to be paid by the common carrier in whose possession the same is at the time of inspection.

Rule XI.

All moneys collected by State grain inspectors and other
28 officers, as herein provided for, shall be by them paid into the State treasury each and every week.

Rule XII.

The office of chief inspector of grain shall be kept open for business from 8 a. m. until 6 p. m. from the 15th day of April to the 15th day of November, and from 9 a. m. to 5 p. m. during the remainder of the year.

Rule XIII.

The chief inspector shall keep a set of books, in which shall be entered an accurate account of all the grain inspected, the amount of inspection fees chargeable thereon, by whom payable, and the amount collected; which books shall be open at all times to the inspection of the commissioners of railroads or either of them.

Rule XIV.

In case of emergencies the chief inspector of grain shall have power to employ, temporarily, in accordance with law, such additional help as the exigencies of the service may require, certifying that such additional help was necessary, and reporting the same at once to the commissioners of railroads; and it shall be the duty of said chief inspector, when in his judgment the interest of the service demands immediate action, to remove from duty any of the employés in his department for any gross violation of duty and report the same at once to the commissioners of railroads, together with the facts in the case upon which such action shall have been taken.

Rule XV.

The said chief inspector shall, previous to the 10th day of each month, transmit to the office of the commissioners of railroads a statement showing the expenses of the department for the previous month, the statement to be accompanied by the bills of the said expenses and pay-rolls, giving the names and duties of all employés of the department, including those employed in the office of the registrar and the amount due to each, said bills and pay-rolls being certified as correct by said chief inspector.

29 Rule XVI.

Upon the approval of said bills and pay-rolls by the board of commissioners of railroads the said board shall order warrants drawn upon the treasurer of the State of North Dakota for the amounts due to the said chief inspector, his deputies and employés, and the employés of the registrar and the bills for necessary supplies for said officers; said warrants to be signed by the chairman of the board of commissioners of railroads and countersigned by the secretary, who shall affix the seal of the board of commissioners of railroads to the same, and the said secretary shall keep a stub of said warrants, which stub shall show the amount, the date of issue, the number, and the service rendered or goods furnished.

Rule XVII.

The chief inspector is hereby authorized and directed to collect such charges for inspection and weighing of grain as may be established from time to time by the commissioners of railroads and all moneys that may become due on account of the inspection and pay the same into the State treasury to the credit of the commissioners of railroads, to be drawn on their warrant for the payment of salaries and other expenses of the department upon pay-rolls and bills approved by the board of commissioners of railroads as prescribed for in rule 16.

Rule XVIII.

The word "new" shall be inserted in each certificate of inspection of a newly harvested crop, as follows, to wit: Wheat until the 15th day of September.

This change shall be construed as establishing a "new" grade for the time specified, to conform in every particular to the existing grades of grain, excepting as to the distinction of "new" and "old."

Rule XIX.

The said chief inspector is hereby authorized to collect, until further notice, on all grain inspected under his direction as follows, to wit:

For inspection on arrival for each car-load, fifty (50) cents.

30 These charges are by law constituted a lien upon such grain inspected, and shall be treated as "advance charges," to be paid by the common carrier in whose possession the same is at the time of inspection.

Rule XX.

The said chief inspector shall deliver to his successor in office all money, books, papers, and other property remaining in his hands or subject to his control at the expiration of his term of office or upon his removal from or discontinuance in office as such chief inspector, or turn the same over to the commissioners of railroads at any time when demanded by the board of said commission-.

Rule XXI.

The offices of chief deputy inspectors shall be kept open for business from 8 a. m. until 6 p. m. from April 15th until November 15th, and from 9 a. m. until 5 p. m. during the remainder of the year; said chief deputy inspectors shall keep a set of books, in which shall be kept an accurate account of all grain inspected, showing the grade and condition of each variety, the amount of inspection fees chargeable thereon and by whom payable, and the amount collected, which books shall be open to the commissioners of railroads, and shall make a daily report of all transactions occurring in his office of chief deputy inspector to the chief inspector.

Rule XXII.

Each chief deputy inspector shall have power to recommend to the chief inspector such suitable persons for assistant inspectors as he may require for the proper transaction of the business of the department at his post or station, and each chief deputy inspector shall have a general supervision over all assistant inspectors and employés of the department at his post or station, and shall enforce all laws, rules, and regulations pertaining thereto, and shall report promptly to the chief inspector if, in his opinion, the services of any employé can be dispensed with; said chief deputy shall, in case of emergency, by and with the consent of the chief inspector, have power to employ temporarily such additional help as the
31 emergency of the case may demand; said chief deputy shall, when in his judgment the interests of the service demand immediate action, have power to relieve from duty any employé in the department at his post or station for any gross violation of duty and report at once the same to the chief inspector, with such facts in the case as may be at his command upon which such action was taken.

Rule XXIII.

The chief deputy inspector shall, upon the request of the shipper or receiver, issue a certificate for any one car of grain inspected, stating therein the names of the assistant inspector and a true copy of the inspection copied from his record of such inspection. If request is for grain delivered from an elevator, he shall state in the certificate the entire lot of all grades of that kind of grain delivered to cars or other vehicles, as the case may be. No alterations or erasures will be allowed upon such certificate. Certificates shall be signed by the chief deputy issuing them and in the name of the chief, per chief deputy.

Rule XXIV.

If any railroad company, warehousman, shipper, or any other proper person shall desire the service of any employé of the grain inspection department for the purpose of inspecting grain or doing other work in the line of his duty as such employé upon Sunday or

any legal holiday or at night, said party or parties shall apply to the chief deputy inspector of grain for the service of such employé, and said chief deputy inspector shall, if in his opinion such necessity exists for the service being rendered upon such Sunday or legal holiday, require such employé to perform such service: Provided that no employé shall be required to do any service in his line of duty upon Sunday if he has conscientious scruples against Sunday labor.

Rule XXV.

Each assistant inspector will be required to take an oath of office and give a bond in the penal sum of $1,000, subject to the approval of the commissioners of railroads, for the faithful and impartial discharge of his duties. Chief deputy and assistant inspector- are
32 hereby required to give thirty days' notice in writing to the chief inspector before resigning or leaving the service.

Rule XXVI.

Deputy and assistant inspectors and helpers shall be at their posts ready for business at the railroad tracks or at the elevators to which they are assigned from 7 a. m. until 6 p. m. of each day from March 15th until November 15th, and from 8 a. m. until 5 p. m. during the remainder of the year unless otherwise ordered by the chief inspector. Where receipts are large and the interests of the service require an earlier inspection all deputy and assistant inspectors and helpers assigned to duty on the tracks will begin work at as early an hour as practicable. Inspectors stationed at elevators shall, when necessary to complete the shipment upon which they are engaged, remain on duty as late in the evening as they can see to inspect safely.

Rule XXVII.

Deputy and assistant inspectors must make their reason for grading grain fully known by notations on their books.

Each deputy or assistant inspector is required, in case of doubt, to ascertain the weight per measured bushel of each lot of wheat inspected by him and note the same in his book. The weight alone shall not determine the grade.

No deputy or assistant inspector shall in any case make the grade of any lot of grain above that of the poorest quality found in that lot where it bears evidence of having been "plugged or "doctored" for the purpose of deception.

Rule XXVIII.

Inspectors will carefully note the condition of the cars containing grain which they inspect by notations in their book and report to their chief deputy or the chief inspector any leakage in cars, broken seals, open doors, and filthy condition of the cars, if it exists, which report must be carefully recorded and preserved for

future reference. Track inspectors and helpers shall see that all doors to cars standing upon track are closed after inspection and properly sealed.

33

Rule XXIX.

Each inspector must be particular that all inspection tickets placed by him upon cars on his track are plainly written. No alteration or erasure must occur upon tickets. In case of an error he shall make out a new ticket, carefully destroying the old one. This ticket must contain, first, date of inspection; second, number and initial letters of the car; third, the grade of grain in that car; fourth, the amount of shrinkage per bushel, if uncleaned; fifth, the test weight of the measured bushel of grain; sixth, the name of the inspector. Each inspector must personally fill out and sign each ticket.

Rule XXX.

Inspectors stationed at elevators shall see that the car or other vehicle into which they inspect grain is made clean and in a proper condition to receive the same, paying particular attention to cars which have been used for transporting coal oil, stock, etc., and on no account suffer grain to go into such a car or vehicle if there is danger of its becoming damaged by reason thereof. Warehousemen will be required to exercise similar precaution against loading grain into cars or other vehicles not in proper condition.

Rule XXXI.

Each inspector shall report in writing to the chief deputy or chief inspector all attempts to defraud the system of grain inspection as established by the commissioners of railroads. He shall also report in writing to the chief deputy of chief inspector all attempts when warehousemen deliver or attempt to deliver any grain of a lower grade than that called for by the warehouse receipt. He shall also report all attempts of receivers or shippers of grain to instruct or otherwise influence the action or opinion of himself or any other inspector, and the chief deputy inspector shall report all such cases to the chief inspector. Private inspectors and others not upon the force will not be allowed in the car during the inspection.

Rule XXXII.

Each inspector in charge of a track or warehouse inspection station must sign his name to each daily return of inspection
34 and to each stub and duplicate on each page of his shipping book and at the end of his daily report.

Rule XXXIII.

Each inspector shall have his books of inspection correctly written up in such manner and at such times as the chief inspector may

direct, avoiding all alterations, erasures, and abbreviations as much as possible, due regard being had for correctness and legibility, leaving nothing to be guessed at.

Rule XXXIV.

In case any owner, consignee, shipper, or warehouseman shall be aggrieved by the decision of any inspector or any lot of grain and shall desire a reinspection of the same, he shall immediately give notice in writing to the chief inspector or chief deputy in charge of the district where the grain was originally inspected of his desire for a reinspection, accompanied with the sum of one (1) dollar, if upon a car-load, and if upon a boat-load the sum of two (2) dollars, which sum shall be returned to the party desiring the inspection should the grade of the original inspection not be confirmed. Said chief inspector or chief deputy inspector shall as soon as practicable, either in person or through his first assistant, cause a new inspection of the grain in question, and shall cause the reinspection of such grain to be carefully made, taking into consideration the quality, condition, and weight, and carefully noting the same in a book to be kept for that purpose, and the grade determined upon by the said chief inspector, chief deputy, or his first assistant shall be considered as the proper grade of such grain.

Rule XXXV.

After such reinspection, should any party interested in said lot of grain feel himself aggrieved and desire to appeal from the same he shall then make such appeal in the book of appeals and deposit with the chief deputy the sum of five (5) dollars if upon a car-load, and ten (10) dollars if upon a boat-load, which sum shall be returned to him if his appeal be sustained, and said chief deputy shall immediately transmit notice of the same, together with all the facts and a fair sample of the grain in dispute and all evidence in the case in his possession, to the chief inspector, who shall thereupon immediately transmit the same and the sample of grain so sent, together with all the facts so submitted, to the commissioners of railroads, who will at their earliest convenience render their decision and determine the grade of the grain in dispute, which decision shall be final and binding upon all parties.

In case such appeal is not taken before the grain in dispute shall have lost its identity, then the right of appeal shall be deemed waived and no longer exist.

Rule XXXVI.

It shall be the duty of inspectors at terminal points to apply to the conductor, agent, or other person in charge of cars loaded with grain to open said cars for the purpose of inspection, and in case of the neglect or refusal of the said conductor, agent, or other person to open said cars the said inspector shall have power and it shall be

his duty to break the seal of said cars and inspect the grain therein contained.

Rule XXXVII.

Conductors in charge of trains loaded or partly loaded with grain at terminal points, upon application being made to them by inspectors, shall stop their trains sufficient time and give the inspector ample facilities to inspect the grain on board his train, and for that purpose the said conductors or other persons in charge of said train shall cause the doors of the cars in said train to be opened, and if the said conductor or other person in charge of said train neglect or refuse to open the said car doors, as hereinbefore provided, the said inspector shall have authority to open the same, whether sealed or not, and it shall be the duty of the said inspector to open the said car doors and inspect the grain therein contained.

Rule XXXVIII.

The use of malt, vinous, or spirituous liquors by the employés of the inspection and registration departments during business
36 hours is forbidden and the penalty for intoxication shall be discharge from the service.

Rule XXXIX.

Duties of Warehouse Registrar, with Rules of Registration.

It shall be the duty of the warehouse registrar to keep a registration book for each public elevator, in which shall be entered a correct description of each warehouse receipt that may be registered. The warehouse registrar shall appoint an assistant register for each of the towns of Grand Forks, Fargo, Wahpeton, and Fairmount, who shall transact the business of the office at such town and make to him, under his direction, a detailed report of such business, and the commissioners of railroads shall fix the salaries of such assistant registrars.

Rule XL.

All original receipts intended for registration shall be presented upon the day of issue, if possible, and all original receipts issued to any person or firm upon any one day shall be presented for registration at the same time.

Rule XLI.

Any person applying for the registration of a split or consolidated receipt shall present all parts of such split or consolidation at one and the same time.

Rule XLII.

The warehouseman of every public warehouse located at Grand Forks, Fargo, Wahpeton, and Fairmount shall, on or before Tues-

day morning of each week, cause to be made out and shall keep posted up in the business office of his warehouse, in a conspicuous place, a statement of the amount of each kind and grade of grain in store in his warehouse at the close of business on the previous Saturday, and shall also on each Tuesday morning render a similar statement, made under oath before some officer authorized by law to administer oaths, by one of the principal owners or operators thereof or by the book-keeper thereof having personal knowledge of the facts, to the warehouse registrar. They shall
37 also be required to furnish daily to the said registrar a correct state*statement* of the amount of each kind and grade of grain received in store in such warehouse on the previous day; also the amount of each kind and grade of grain delivered or supplied by such warehouseman during the previous day, and what warehouse receipts have been cancelled upon which the grain has been delivered on such day, giving the number of each receipt and amount, kind, and grade of grain received and shipped upon each; also how much grain, if any, was so delivered or shipped, and the kind and grade of it, for which warehouse receipts had not been issued, and when and how such unreceipted grain was received by them; the aggregate of such reported cancellations and delivery of unreceipted grain corresponding in amount, kind, and grade with the amount so reported delivered or shipped. They shall also at the same time report what receipts, if any, have been cancelled and new ones issued in their stead as herein provided for, and the warehouseman making such statements shall in addition furnish the said registrar any further information regarding receipts issued or cancelled that may be necessary to enable him to keep a full and correct record of all receipts issued and cancelled and of grain received and delivered.

Rule XLIII.

When the receipts are presented for registration the said registrar or his assistant shall carefully compare the same with the returns that shall have been made to him, and if he shall be satisfied of the correctness of the same he shall stamp them with a proper stamp for that purpose, containing in legible letters the date of such presentation and the name of the registrar, with the title of his office, "warehouse registrar," and the name of the town at which it was registered; but if he shall find that any differences exist he shall institute a thorough examination into the reasons therefor and shall have such error corrected before affixing the stamp, and if it shall appear that any fraud in the issuance of such receipt shall have been attempted by the warehouseman the said registrar or his assistant shall at once report the same to the commissioners of railroads.

Rule XLIV.

38 The said registrar or his assistants shall carefully preserve all reports of receipts and shipments made to his office by the public elevators in pursuance of law or under such regulations as may be

established, and shall keep an accurate account of the grain so reported in proper books with such warehouse firm, and when such reported shipment shall agree with receipts cancelled for each shipment he shall mark "cancelled," with the date thereof, on his registration book opposite the recorded description of each receipt.

Rule XLV.

The said registrar shall have general supervision over his assistants and shall direct all such employés in the discharge of their duties. In cases of emergency he shall have power to employ temporarily such additional assistants as the exigencies of the service may demand, reporting the same promptly to the commissioners of railroads and certifying that such additional assistance was necessary. He shall also report to the commissioners promptly if, in his opinion, the services of the persons so employed can be dispensed with.

Rule XLVI.

The said registrar shall keep in his office a complete list of all warehouse licenses granted.

39 *Authentication.*

STATE OF NORTH DAKOTA,
OFFICE OF COMMISSIONERS OF RAILROADS, BISMARCK, N. D.

I, M. J. Edgerley, secretary of the commissioners of railroads of the State of North Dakota, do hereby certify that the rules and regulations contained in this pamphlet are true and correct copies of the original rules and regulations adopted by the board of commissioners of railroads of the State of North Dakota on the 1st day of August, 1891.

In testimony whereof I have hereunto set my hand and affixed the seal of the commissioners of railroads of the State of North Dakota this 1st day of August, 1891.

M. J. EDGERLEY,
[L. S.] *Secretary Commissioners of Railroads,*
State of North Dakota.

40 STATE OF NORTH DAKOTA, }
County of Ramsey. }

District Court, 2nd Judicial District.

STATE OF NORTH DAKOTA *ex Rel.* LOUIS W. STORER, Relator, }
vs.
NORMAN BRASS, Respondent. }

The relators demurs to the return and answer of the respondent on the following grounds:

First. That the said return does not state facts sufficient to con-

stitute a defense to the cause of action stated in said alternative writ.

Second. That said return does not show cause sufficient in law why respondent has not complied with the mandate of said alternative writ.

Third. That said return does not show cause sufficient in law why a peremptory writ of mandamus should not issue in this proceeding commanding the respondent peremptorily to do and perform the service enjoined by the mandate of said alternative writ.

Dated Oct. 5th, 1891.

JAMES F. O'BRIEN,
Attorney for Relator.

(Endorsement:) Ramsey county, North Dakota. Filed in the office of the clerk of the district court this 5 day of Oct., 1891. T. C. Saunders, clerk of dist. court." "Due service admitted Oct. 5, 1891. John A. Maher, attorney for respondent."

41 STATE OF NORTH DAKOTA, }
County of Ramsey, }

District Court, Second Judicial District.

STATE OF NORTH DAKOTA *ex Rel.* LOUIS W. STOESER, Relator, }
vs. }
NORMAN BRASS, Respondent. }

The above-entitled proceedings having come before the court at chambers, at Devil's Lake, Ramsey county, North Dakota, on Oct. 5th, 1891, pursuant to the order to show cause contained in the alternative writ issued herein, and the respondent having appeared, by John W. Maher, his attorney, and interposed a return to said alternative, and the relator thereupon, by his attorney, Jas. F. O'Brien, having interposed a demurrer to said return, and the undersigned judge having heard said Jas. F. O'Brien in behalf of said relator and the said John W. Maher on behalf of said respondent, and having duly considered said matter and being fully advised in the premises—

It is ordered that said demurrer be, and the same is hereby, sustained to said return, and, the respondent electing in open court to stand on said demurrer, a peremptory writ of mandamus will be issued as prayed for.

Dated Oct. 5th, 1891.

D. E. MORGAN, *Judge.*

Attest: T. C. SAUNDERS, *Clerk,*
By D. G. DUELL, *Deputy.* [SEAL.]

Endorsement: Ramsey county, North Dakota. "Filed in the office of the clerk of the district court this 5th day of Oct., 1891. T. C. Saunders, clerk of dist. court." "Due service admitted October 5th, 1891. John W. Maher, attorney for respondent."

42 STATE OF NORTH DAKOTA, }
County of Ramsey. }

District Court, Second Judicial District.

STATE OF NORTH DAKOTA *ex Rel.* LOUIS W. STOESER, Relator, }
vs.
NORMAN BRASS, Respondent. }

To James F. O'Brien, attorney for the above-named plaintiff and relator, and T. C. Saunders, Esq., clerk of the district court of Ramsey county, North Dakota:

Please take notice that the above-named respondent, Norman Brass, hereby appeals to the supreme court of the State of North Dakota from the order made by the above-entitled court in the above-entitled action on the 5th day of Oct., 1891, sustaining the demurrer of the above-named relator to the answer and return of the above-named respondent to the alternative writ of mandamus issued in the above-entitled action on the 30th day of Sept., 1891.

Dated Oct. 6th, 1891.

JOHN W. MAHER,
Attorney for Respondent.

Due service of the above notice of appeal is hereby admitted at Devil's Lake, N. D., this 6th day of Oct., 1891.

JAMES F. O'BRIEN,
Attorney for Relator.

Due service of the above notice of appeal is hereby admitted at Devil's Lake, N. D., this 6th day of Oct., 1891.

T. C. SAUNDERS,
Clerk of the District Court Ramsey County, N. D.,
By D. G. DUELL, *Deputy.*

(Endorsement:) Ramsey county, North Dakota. Filed in the office of the clerk of district court this day, Oct. 7th, 1891. T. C. Saunders, clerk of dist. court, by D. G. Duell, deputy.

43 STATE OF NORTH DAKOTA, }
County of Ramsey. }

District Court, Second Judicial District.

STATE OF NORTH DAKOTA *ex Rel.* LOUIS W. STOESER, Relator, }
vs.
NORMAN BRASS, Respondent. }

Whereas on the fifth day of October, 1891, the district court within and for the county of Ramsey and State of North Dakota sustained a demurrer of the relator in the above-entitled action to the answer and return of the above-named respondent, Norman Brass, to the alternative writ of mandamus therein, and the said respondent, Brass, feeling aggrieved thereby, intends to appeal from said order

sustaining said demurrer to the supreme court of the State of North Dakota:

Now, therefore, we do hereby undertake that the said appellant will pay all costs and damages which may be awarded against him on said appeal or on a dismissal thereof and all damages that said relator may suffer in consequence of said appeal being taken, not exceeding the sum of two hundred and fifty dollars.

Dated October 6th, 1891.

ABRAM O. WHIPPLE.
GEORGE J. JUERGENS.

STATE OF NORTH DAKOTA, } ss:
County of Ramsey, }

On this 6th day of October, 1891, before me, John W. Maher, a notary public in and for said county and State, personally appeared Abram O. Whipple and George J. Juergens, known to me to be the persons who are described in and who executed the within and foregoing instrument, and acknowledged to me that *he* executed the same.

JOHN W. MAHER,
[NOTARIAL SEAL.] *Notary Public, Ramsey County, N. D.*

44 STATE OF NORTH DAKOTA, }
County of Ramsey. }

Abram O. Whipple and George J. Juergens, being duly sworn, on oath states each for himself that he is one of the sureties above named; that he is a resident and freeholder of the county of Ramsey and State of North Dakota and worth the sum of five hundred dollars above his debts and liabilities and exclusive of his property exempt from execution.

ABRAM O. WHIPPLE.
GEORGE J. JUERGENS.

Subscribed and sworn to before me this 6th day of October, 1891.

[NOTARIAL SEAL.] JOHN W. MAHER,
Notary Public, Ramsey County, North Dakota.

Due service of the within undertaking on appeal is hereby admitted, at Devil's Lake, North Dakota, this 6th day of October, 1891.

JAS. F. O'BRIEN,
Attorney for Relator.

The above undertaking as to form and sufficiency of sureties is hereby approved, and the issue of a peremptory writ of mandamus is hereby stayed pending said appeal.

Dated October 6th, 1891.

D. E. MORGAN, *Judge.*

(Endorsed:) Ramsey county, North Dakota. Filed in the office of the clerk of the district court this day of Oct. 7th, 1891. T. C. Saunders, clerk of dist. court, by D. G. Duell, deputy.

45 STATE OF NORTH DAKOTA, }
County of Ramsey. }

District Court, Second Judicial District.

STATE OF NORTH DAKOTA *ex Rel.* LOUIS W. STOESER, Relator, }
vs.
NORMAN BRASS, Respondent. }

I, D. E. Morgan, judge of the above-entitled court, do hereby certify that I have carefully examined each of the foregoing papers, to wit: The petition for the alternative writ of mandamus, alternative writ of mandamus, return and answer to said alternative writ of mandamus, demurrer to said return and answer, order sustaining said demurrer, notice of appeal, and undertaking on appeal.

That the said papers are all the original papers in said action and not copies, and said petition, alternative writ and answer and return thereto, and demurrer are all the papers on which said order sustaining said demurrer was made.

D. E. MORGAN, *Judge.*

Attest: T. C. SAUNDERS, *Clerk,*
By D. G. DUELL, *Deputy.*
[Seal of Dist. Court, Ramsey C., N. D.]

(Endorsed:) Ramsey county, North Dakota. Filed in the office of district court this day of Oct. 7th, 1891. T. C. Saunders, clerk of dist. court, by D. G. Duell, deputy.

46 STATE OF NORTH DAKOTA, }
County of Ramsey. }

District Court, Second Judicial District.

STATE OF NORTH DAKOTA *ex Rel.* LOUIS W. STOESER, Relator, }
vs.
NORMAN BRASS, Respondent. }

Assignment of Errors.

The appellant says that there is manifest error on the face of the record herein, in this:

I.

That the court erred in sustaining the relator's demurrer to the appellant's answer and return.

II.

That the court erred in not overruling the relator's demurrer to the appellant's answer and return.

III.

That the court erred in holding chapter 126 of the Laws of 1891, and particularly section eleven of that chapter, constitutional.

IV.

The court erred in not holding chapter 126 of the Laws of 1891 as a whole, and particularly section eleven of that chapter, unconstitutional and void.

J. F. McGEE,
Attorney for Appellant Brass.

47 STATE OF NORTH DAKOTA, }
County of Ramsey. }

District Court, Second Judicial District.

STATE OF NORTH DAKOTA *ex Rel.* LOUIS W. STOESER, Relator, }
vs. }
NORMAN BRASS, Respondent. }

I, T. C. Saunders, clerk of the above-entitled court, do hereby certify that the papers and all the papers included in the foregoing transcript, viz., petition for alternative writ of mandamus, alternative writ of mandamus, return and answer to the alternative writ of mandamus, demurrer to return and answer, order sustaining demurrer to the said return and answer, notice of appeal to supreme court and undertaking on appeal to supreme court, and certificate of the district judge to said transcript, assignment of errors—that each of the said papers herein enumerated are the original papers and all the papers on which said order sustaining said demurrer was made.

All of said papers contained in said transcript as aforesaid are hereby transmitted to the supreme court of North Dakota pursuant to the appeal taken in said action.

[Seal of Dist. Court of Ramsey County, North Dakota.]

T. C. SAUNDERS,
Clerk of District Court of Ramsey County, North Dakota,
By D. G. DUELL, *Deputy.*

On the wrapper enclosing all the foregoing papers is the following endorsement:

134. Filed in the clerk's office supreme court, State of North Dakota, Oct. 21, 1891. R. D. Hoskins, clerk.

48 STATE OF NORTH DAKOTA, *ss:*

In Supreme Court.

Be it remembered that at a term of the supreme court of the State of North Dakota begun and held at Fargo, State of North Dakota, on the second Tuesday of January, A. D. 1892, on the — day of the term, to wit, on the 22nd day of April, A. D. 1892—present, Guy C. H. Corliss, chief justice, and J. M. Bartholomew and Alfred Wallin, associate justices, of said court—the following proceedings were had and the following order for judgment was entered, to wit:

STATE OF NORTH DAKOTA, *ss*:

In the Supreme Court.

Appeal from the district court of Ramsey county.

STATE OF NORTH DAKOTA *ex Rel.* LOUIS W. STOESER, Plaintiff and Respondent,
vs.
NORMAN BRASS, Defendant and Appellant.

This action coming on to be heard at the January, A. D. 1892, term of this court, at the supreme court room, in the city of Fargo, State of North Dakota—present, Guy C. H. Corliss, chief justice, and J. M. Bartholomew and Alfred Wallin, associate justices—and the appeal herein having been argued by J. F. McGee, for the appellant, and by James F. O'Brien, for respondent, and the court having advised thereon, it is now here considered, ordered, and adjudged
49 that the order of the said district court within and for said Ramsey county appealed from herein be, and the same is hereby, affirmed.

And it is further ordered that this cause be, and it is hereby, remanded to the district court for further proceedings according to law and the judgment of this court.

And it is further considered and adjudged that respondent have and recover of the appellant costs and disbursements in this appeal expended, to be taxed and allowed in the district court.

Dated April 22nd, 1892.

By the court:

GUY C. H. CORLISS,
Chief Justice.

Attest:
[SEAL.] R. D. HOSKINS, *Clerk.*

50 STATE OF NORTH DAKOTA:

In Supreme Court.

I, R. D. Hoskins, clerk of the supreme court within and for the State of North Dakota, do hereby certify that the above and foregoing is a full, true, correct, and complete transcript and copy of order for judgment of the supreme court of the State of North Dakota in the above-entitled action, wherein State of North Dakota *ex rel.* Louis W. Stoeser is plaintiff and respondent *versus* Norman Brass, defendant and appellant, as the same now remains of record in said court.

In witness whereof I have hereunto set my hand and affixed the seal of the said court this 20th day of May, A. D. 1892.

[Seal of Supreme Court, State of North Dakota.]

R. D. HOSKINS, *Clerk.*

(Endorsed:) Filed in court this 25th day of April, 1892. R. D. Hoskins, clerk.

(Endorsed:) Ramsey county, North Dakota. Filed in the office of the clerk of district court this 25th day of May, 1892. T. C. Saunders, clerk of dist. court.

51 STATE OF NORTH DAKOTA, *County of Ramsey.*

District Court, Second Judicial District.

STATE OF NORTH DAKOTA *ex Rel.* LOUIS W. STOESER, Relator,
vs.
NORMAN BRASS, Respondent.

To J. F. McGee, Esq., attorney for respondent:

Please take notice that application will be made to the Hon. D. E. Morgan, judge of the said district court, at his chambers, in the city of Devil's Lake, in said county and State, on the 28th day of May, 1892, at ten o'clock a. m., or as soon thereafter as counsel can be heard, for an order making the judgment of the supreme court of said State in the above action the judgment of the said district court.

Yours respectfully, JAS. F. O'BRIEN,
Att'y for Relator.

May 24th, 1892.

(Endorsed:) Due service admitted May 25th, 1892. J. F. McGee, att'y for respondent.

(Endorsed:) Ramsey county, North Dakota. Filed in the office of the clerk of district court this 28th day of May, 1892. T. C. Saunders, clerk of dist. court.

52 STATE OF NORTH DAKOTA, *County of Ramsey.*

District Court, Second Judicial District.

STATE OF NORTH DAKOTA *ex Rel.* LOUIS W. STOESER, Relator,
vs.
NORMAN BRASS, Respondent.

Whereas the above-entitled proceeding came before the court on the 30th day of September, 1891, on the application of the above-named relator for an alternative writ of mandamus, commanding the respondent as a public warehouseman to receive and store the grain of relator at the rate of compensation fixed by section 11 of chapter 126 of the Laws of 1891;

Whereas the said alternative writ of mandamus was issued in said proceeding on September 30th, 1891, as prayed for, returnable on the 5th day of October, 1891, at which time the respondent Brass interposed to said alternative writ a return and answer;

Whereas the relator on the filing of said return and answer to

said alternative writ interposed a general demurrer to the same, which demurrer after argument was duly sustained to said return and answer, and, the respondent Brass electing in open court to stand upon said return and answer, it was ordered that a peremptory writ of mandamus issue, commanding the respondent to receive and store the grain of relator for the compensation provided in section 11 of chapter 126 of the Laws of 1891;

Whereas the respondent Brass on October 6th, 1891, perfected an appeal from said order and judgment to the supreme court
53 of North Dakota; which said supreme court, at its regular January, 1892, term, after due argument and consideration, affirmed said order and judgment in all things by its judgment dated April 22nd, 1892, and filed and entered in said supreme court on April 25th, 1892;

Whereas the said judgment of said supreme court provides "that this cause be, and it is hereby, remanded to the district court for further proceedings, according to law and the judgment of this court; and it is further considered and adjudged that respondent have and recover of the appellant costs and disbursements on this appeal expended, to be taxed and allowed in the district court;"

Whereas the facts aforesaid appear by the remittitur of the said supreme court now on file in the office of the clerk of this court, with the judgment of the said supreme court and the original record in this proceeding, remitted from said supreme court:

Now, therefore, on reading and filing the remittitur and on motion of James F. O'Brien, attorney for the relator, it is ordered that the said judgment of said supreme court be, and the same is hereby, made the judgment of this court.

It is further ordered and adjudged that on the filing and entry of this judgment that there issue out of and under the seal of this court, to enforce this judgment, a peremptory writ of mandamus directed to the respondent, Brass, commanding said respondent forthwith to receive from the relator all grain that he may tender in dry and suitable condition for storage and store the same for relator at a rate of compensation not exceeding the following schedule, viz: For receiving, elevating, insuring, delivering, and twenty days' storage, twenty cents per bushel; storage rates after the first twenty days, one-half cent per bushel for each fifteen days or
54 fraction thereof and shall not exceed five cents for six months.

It is further ordered and adjudged that the relator do have and recover of and from the respondent, Brass, the costs and disbursements of this action, to be taxed by the clerk of this court, together with the costs and disbursements of respondent on the appeal herein to the supreme court to be inserted herein.

Dated May 28th, 1892.

By the court:

D. E. MORGAN, *Judge.*

Attest: T. C. SAUNDERS,
Clerk Dist. Court Ramsey County, N. D.

[Seal District Court Ramsey County, North Dakota.]

(Endorsed:) Ramsey county, North Dakota. Filed in the office of the clerk of district court this 28th day of May, 1892, at 11.20 a. m. T. C. Saunders clerk of dist. court.

55 STATE OF NORTH DAKOTA, } ss:
County of Ramsey, }

In the District Court, Second Judicial District.

STATE OF NORTH DAKOTA *ex Rel.* LOUIS W. STOESER, Relator,
vs.
NORMAN BRASS, Respondent.

Relator's costs and disbursements.

Statute costs in district court	$13 00
Sheriff's fees	4 60
2 affidavits	50
Clerk's fees to be taxed	4 65

Costs in supreme court.

Attorney's fees before argument	5 00
" " " "	15 00
Printer's fees, relator's brief	16 00
Clerk's " in supreme court, to be taxed	22 30
	$81 05

The above bill of costs and disbursements taxed and allowed at $81.05.

Dated May 28th, 1892.

[Seal Dist. Court.]

T. C. SAUNDERS, *Clerk.*

56 STATE OF NORTH DAKOTA, } ss:
County of Ramsey, }

Jas. F. O'Brien came personally before me and, *and* having been first by me duly sworn, deposes and says that he is the attorney of said relator in the above-entitled action; that the above bill and items of costs and disbursements therein are just and correct and have been or will be necessarily incurred in said action.

JAS. F. O'BRIEN.

Subscribed and sworn to before me this 25th day of May, 1892.

[NOTARIAL SEAL.]

S. A. NYE,
Notary Public, N. D.

Please take notice that on the 28th day of May, A. D. 1892, at 2 o'clock p. m., application will be made to T. C. Saunders, Esq., clerk of said court, at his office in the court-house, in the city of Devil's Lake, in the county of Ramsey and State of North Dakota, to have

the foregoing bill of costs and disbursements taxed and inserted in the judgment then and there to be entered in this suit.

Dated May 25th, 1892.

Yours respectfully, JAS. F. O'BRIEN,
Attorney for Relator.

To. J. F. McGee, respondent's attorney.

(Endorsed:) Due service admitted May 25th, 1892. J. F. McGee, att'y for respondent.

(Endorsed:) Ramsey county, North Dakota. Filed in the office of the clerk of district court this 28 day of May, 1892, at 11.20 a. m. T. C. Saunders, clerk of dist. court.

57 Know all men by these presents that we, Norman Brass, of Fargo, North Dakota, as principal, and Charles F. Sims and Martin Van Kirk, both of Grand Forks, North Dakota, as sureties, are held and firmly bound unto the State of North Dakota and Louis W. Stoeser in the full and just sum of two thousand ($2,000) dollars to be paid to the said State of North Dakota and Louis W. Stoeser, their attorneys, executors, administrators, and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 8th day of June, A. D. 1892.

Whereas lately, at a term of the district court of the second judicial district of the State of North Dakota within and for Ramsey county, in said State, in a suit pending in said court between The State of North Dakota on the relation of Louis W. Stoeser as relator and Norman Brass as respondent, a judgment was rendered against the said Norman Brass whereby the judgment of the supreme court of the State of North Dakota was made the judgment of said district court of the second judicial district of the State of North Dakota within and for said Ramsey county, thereby affirming the judgment and order of the said district court of the secon- judicial district of the State of North Dakota within and for said Ramsey county, dated October 5th, 1891, awarding a peremptory writ of mandamus commanding the said Norman Brass to receive, elevate, insure, deliver, and for twenty days store all grain that might be tendered to him by the relator, Louis W. Stoeser, at a rate of compensation not exceeding the following schedule: For the first twenty days, two cents per bushel; storage rates after the first twenty days, one-half cent per bushel for each fifteen days or fraction thereof, and not exceeding five cents for six months, and awarding against said Norman Brass the costs of said proceeding, and the said Norman Brass, respondent, having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment in the suit aforesaid and a citation directed to the State of North Dakota and Louis W. Stoeser, the relator aforesaid, citing and admonishing said State of North Dakota and Louis W. Stoeser to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Norman Brass shall prosecute said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

N. BRASS. [SEAL.]
CHARLES F. SIMS. [SEAL.]
MARTIN VAN KIRK. [SEAL.]

Signed, sealed, and delivered in presence of—
F. B. FLEETHAM,
C. J. MURPHY,
As to sureties.
WILLARD A. REGAN,
C. E. JOSLIN,
As to N. Brass.

I hereby approve the foregoing bond both as to its form and the sufficiency of its sureties.

Dated at Fargo, North Dakota, June 13th, 1892.

JAS. F. O'BRIEN,
Attorney for Defendant in Error.

Approved by—
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

Dated June 16th, 1892.

58 STATE OF NORTH DAKOTA, } ss:
County of Cass, }

On this 10th day of June, 1892, before me, a notary public within and for Cass county, North Dakota, personally appeared Norman Brass, known to me personally to be the person described in and who executed the foregoing instrument as principal, and acknowledged that he executed the same as his free act and deed.

[NOTARIAL SEAL.] WILLARD A. REGAN;
Notary Public, Cass County, North Dakota.

STATE OF NORTH DAKOTA, } ss:
County of Grand Forks, }

On this 9th day of June, 1892, before me, a notary public within and for said Grand Forks county, North Dakota, personally appeared Charles F. Sims and Martin Van Kirk, each to me personally known to be the persons described in and who executed the foregoing instrument as sureties, and they severally acknowledged that they executed the same as their free act and deed.

[NOTARIAL SEAL.] FRANK B. FLEETHAM,
Notary Public, Grand Forks County, North Dakota.

STATE OF NORTH DAKOTA, } ss:
County of Grand Forks, }

I, L. K. Hassell, clerk of the district court, Grand Forks county, North Dakota, the same being a court of record, do hereby certify

that Frank B. Fleetham, whose name is subscribed to the proof of acknowledgment of the annexed instrument in writing, was at the time of taking such proof or acknowledgment a notary public in and for said county, duly commissioned, sworn, and authorized to take the same; and, further, that I am well acquainted with his handwriting and believe the signature to the said proof or acknowledgement is genuine; and, further, that the annexed instrument is executed and acknowledged according to the laws of the State *State* of North Dakota.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Grand Forks, in the county of Grand Forks, in the State of North Dakota, this 9th day of June, A. D. 1892.

[Seal of District Court.]

L. K. HASSELL,
Clerk of District Court, Grand Forks County, N. Dakota,
By J. B. WINEMAN, *Deputy.*

59 STATE OF NORTH DAKOTA, } *ss:*
County of Cass, }

I, L. W. Schmith, clerk of the district court of Cass county, North Dakota, the same being a court of record, do certify that William A. Regan, whose name is subscribed to the proof or acknowledgement of the annexed instrument in writing, was at the time of taking such proof or acknowledgement a notary public in and for said county, duly commissioned and sworn and authorized to take the same, and, further, that I am well acquainted with his handwriting and believe that the signature to the said proof or acknowledgement is genuine, and, further, that the annexed instrument is executed and acknowledged according to the laws of the State of North Dakota.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at Fargo, Cass county, North Dakota, this 10th day of June, 1892.

[Seal District Court.]

L. W. SCHMIT,
Clerk District Court, Cass County, North Dakota,
By H. J. HANSEN, *Deputy.*

I, T. C. Saunders, clerk of the district court of Ramsey county, North Dakota, do hereby certify that I have carefully compared the foregoing bond with the original thereof on file in my office, and that the same is a true and exact copy of said original as the same now appears of record in my office.

Dated June 27th, 1892.

[Seal Clerk of the District Court, Ramsey County, North Dakota.]

T. C. SAUNDERS,
Clerk of the District Court of Ramsey County, North Dakota.

60 The Supreme Court of the United States.

In the Matter of the Petition of NORMAN BRASS, Plaintiff in Error.

Assignment of Errors.

And now comes Norman Brass, by J. F. McGee, Esq., his attorney, and says that in the record and proceedings in the above-entitled matter there is manifest error, in this respect, to wit:

I.

That the statute of the State of North Dakota, being chapter one hundred and twenty-six of the Session Laws of said State for the year 1891, entitled "An act to regulate grain warehouses and the weighing and handling of grain and defining the duties of the railroad commissioners in relation thereto," is contrary to the provisions of the first clause of the fourteenth amendment to the Constitution of the United States and void, in this:

A.

Said chapter, and particularly sections four and eleven thereof, and the rules and regulations adopted by the railroad commissioners of said State pursuant thereto deprive the plaintiff in error of his liberty and property without due process of law.

B.

Said chapter, and particularly sections four and eleven thereof, and the rules and regulations adopted by the railroad commissioners of said State pursuant thereto deny to the plaintiff in error the equal protection of the laws.

C.

Said chapter, and particularly sections four and eleven thereof, and the rules and regulations adopted by the railroad commissioners of said State pursuant thereto abridge the privileges and immunities of the plaintiff in error as a citizen of the United States.

61 D.

Said chapter, and particularly sections four and eleven thereof, and the rules and regulations adopted by the railroad commissioners of said State pursuant thereto amount to a regulation of commerce among the States.

II.

The supreme court of North Dakota erred in holding that section four of chapter 126 aforesaid does not deprive the plaintiff in error of his liberty and property without due process of law within the meaning of the first clause of the fourteenth amendment to the Constitution of the United States.

III.

The district court of Ramsey county, North Dakota, erred in holding that section four of chapter 126 aforesaid does not deprive the plaintiff in error of his liberty and property without due process of law within the meaning of the first clause of the fourteenth amendment to the Constitution of the United States.

IV.

The supreme court of North Dakota erred in holding that section eleven of chapter 126 aforesaid does not deny to the plaintiff in error the equal protection of the laws within the meaning of the first clause of the fourteenth amendment to the Constitution of the United States.

V.

The district court of Ramsey county, North Dakota, erred in holding that section eleven of chapter 126 aforesaid does not deny to the plaintiff in error the equal protection of the laws within the meaning of the first clause of the fourteenth amendment to the Constitution of the United States.

62 No. VI.

The supreme court of North Dakota erred in holding that section 4 of chapter 126 aforesaid does not abridge the privileges and immunities of the plaintiff in error as a citizen of the United States.

No. VII.

The district court of Ramsey county, North Dakota, erred in holding that section 4 of chapter 126 aforesaid does not abridge the privileges and immunities of the plaintiff in error as a citizen of the United States.

No. VIII.

The supreme court of North Dakota erred in holding that section 11, chapter 126 aforesaid, does not abridge the privileges and immunities of the plaintiff in error as a citizen of the United States.

No. IX.

The district court of Ramsey county, North Dakota, erred in holding that section 11, chapter 126 aforesaid, does not abridge the privileges and immunities of the plaintiff in error as a citizen of the United States.

No. X.

The supreme court of North Dakota erred in not declaring chapter 126 aforesaid unconstitutional as being in conflict with the first clause of the fourteenth amendment of the Constitution of the United States.

No. XI.

The district court of Ramsey county, North Dakota, erred in not declaring chapter 126 aforesaid unconstitutional as being in conflict with the first clause of the fourteenth amendment of the Constitution of the United States.

63 No. XII.

The supreme court of North Dakota erred in holding that the effect of sections 4 and 11 of chapter 126 aforesaid when construed together does not violate each of the several provisions of the first clause of the fourteenth amendment of the Constitution of the United States.

No. XIII.

The district court of Ramsey county, North Dakota, erred in holding that the effect of sections 4 and 11 of chapter 126 aforesaid when construed together does not violate each of the several provisions of the first clause of the fourteenth amendment of the Constitution of the United States.

No. XIV.

The supreme court of North Dakota erred in commanding and requiring the plaintiff in error to receive and store the grain of the defendant in error at the rate of compensation not exceeding the following schedule, viz: For receiving, elevating, insuring, delivering, and twenty days' storage, two cents per bushel; storage rates after the first twenty days, one half cent per bushel for each fifteen days or fraction thereof, and shall not exceed five cents for each six months.

No. XV.

The district court of Ramsey county, North Dakota, erred in commanding and requiring the plaintiff in error to receive and store the grain of the defendant in error at the rate of compensation not exceeding the following schedule, viz: For receiving, elevating, insuring, delivering, and twenty days' storage, two cents per bushel; storage rates after the first twenty days, one-half cent per bushel for each fifteen days or fraction thereof, and shall not exceed five cents for each six months.

64 No. XVI.

The supreme court of North Dakota erred in requiring and adjudging that the plaintiff in error insure the grain of relator.

No. XVII.

The district court of Ramsey county, North Dakota, erred in requiring and adjudging that the plaintiff in error insure the grain of relator.

Wherefore the said Norman Brass prays that the judgment en-

tered in the district court of Ramsey county, North Dakota, on the 28th day of May, 1892, pursuant to the order and judgment of the supreme court of the State of North Dakota dated April 22nd, 1892, and entered in said supreme court on April 25th, 1892, be reversed and the said supreme court of the State of North Dakota be ordered to reverse its judgment herein and direct the district court of Ramsey county, North Dakota, to set aside its judgment herein and dismiss this action.

J. F. McGEE,
Attorney for Plaintiff in Error,
300-302 *Nicollet Avenue, Minneapolis, Minnesota.*

[Endorsed:] Ramsey county, North Dakota. Filed in the office of the clerk of district court this 27 day of June, 1892. T. C. Saunders, clerk of dist. cour-.

65 UNITED STATES OF AMERICA, }
State of North Dakota. }

To the Honorable David J. Brewer, associate justice of the Supreme Court of the United States:

The petition of Norman Brass respectfully shows that on the 28th day of May, 1892, the district court of Ramsey county, North Dakota, rendered a final judgment in a certain proceeding, wherein The State of North Dakota on the relation of Louis W. Stoeser was plaintiff and relator and your petitioner was defendant and respondent, whereby the judgment of the supreme court of North Dakota in said proceeding, dated April 25th, 1892, was made the judgment of said district court, thereby affirming the order and judgment of said district court of Ramsey county, North Dakota, made and entered October 5th, 1891, declaring your petitioner a public warehouseman, subject to the provisions of chapter 126 of the Laws of 1891 and the rules and regulations made and adopted by the board of railroad commissioners of North Dakota pursuant thereto, and commanding and requiring your petitioner to receive from and store for the relator, Stoeser, all grain that he might tender in a dry and suitable condition for storage at the rate of compensation fixed by section 11 of chapter 126 of the Laws of 1891, as will appear by reference to the record and proceedings in said cause, and that said court is the highest court of said State in which a decision in said suit could be had.

And your petitioner claims the right to remove said judgment to the Supreme Court of the United States by writ of error under section seven hundred and nine of the Revised Statutes of the
66 United States, because there was drawn in question in said cause the validity of a statute of North Dakota on the ground of its being repugnant to the Constitution of the United States, and the decision of said district and supreme courts was in favor of its validity, your petitioner claiming and maintaining in said district and supreme courts of North Dakota that said statute of North Dakota under which the rights guaranteed to your petitioner by sec-

tion I of article fourteen of the Constitution of the United States have been invaded, being chapter 126 of the Laws of 1891, entitled "An act to regulate grain warehouses and the weighing and handling of grain, and defining the duties of the railroad commissioners in relation thereto," was and is contrary to the provisions of section one of article fourteen of the Constitution of the United States, which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, but the said court decided and adjudged that said statute was valid, as appears by the record of the proceedings in said cause, which is herewith submitted.

Wherefore your petitioner prays the allowance of a writ of error returnable into the Supreme Court of the United States and for citation, and your petitioner will ever pray, &c.

(Sign.) N. BRASS, *Petitioner.*

J. F. McGEE,
Attorney for Petitioner.

67 STATE OF NORTH DAKOTA, } ss:
County of Cass, }

Norman Brass, being first duly sworn, on oath states that he resides in Cass county, North Dakota, and is the petitioner named in and who subscribed the foregoing petition; that he has read the said petition and knows the contents thereof; that the same is true to the knowledge of deponent.

(Sign.) N. BRASS.

Subscribed and sworn to before me this 3rd day of June, 1892.

[Seal Willard A. Regan, Notary Public, State of North Dakota.]

WILLARD A. REGAN,
Notary Public, Cass County, North Dakota.

[Endorsed:] Ramsey county, North Dakota. Filed in the office of the clerk of district court this 27 day of June, 1892. T. C. Saunders, clerk of dist. court.

68 In the Supreme Court, State of North Dakota, January Term, 1892.

STATE OF NORTH DAKOTA *ex Rel.* LOUIS W. STOESER, Plaintiff and Respondent,
vs.
NORMAN BRASS, Defendant and Appellant.

Chapter 126 of the Session Laws of 1891 considered, and sections four and eleven thereof held to be constitutional in so far as they define public warehouses and in so far as they prescribe maximum rates of

charges for elevating and storing grain in the public warehouses as they are defined in section four of the act. Following Munn *vs.* Illinois, 66 Ill., 99; 94 U. S., 1; People *vs.* Budd, 117 N. Y., 1; 22 N. E. Rep., 670; Budd *vs.* People, — U. S., —; 12 Sup. Ct. Rep., 468.

Held further that the record does not raise the question of the adequacy of the rate of charges fixed by section eleven of the act, and hence the case is not one which calls for a decision of the point whether the court would in any case assume to review a rate of charges established by the legislature where it was shown that such rate was ruinously small or non-compensatory.

(Syllabus by the court.)

Mandamus proceeding.

Appeal from final order district court for Ramsey county, Hon. D. E. Morgan, judge.

J. F. McGee and John W. Maher, for appellant; James F. O'Brien, for respondent.

WALLIN, *J.*:

The statute under which this proceeding was instituted constitutes chapter 126 of the Session Laws of North Dakota for the Year 1891. It is entitled "An act to regulate grain warehouses and the weighing and handling of grain and defining the duties of the rail-
69 road commissioners in relation thereto." The act contains fourteen sections, but we deem it unnecessary for the purposes of this case to do more than to refer to the statute and then quote sections four and eleven in full. Section four is as follows: "All buildings, warehouses, or elevators in this State, erected or operated or which may be hereafter erected and operated by any person or persons, association, copartnership, corporation, or trust for the purpose of buying, selling, storing, shipping, or handling grain for profit, are hereby declared public warehouses, and the person or persons, association, copartnership, or trust owning or operating said building or buildings, elevator or elevators, warehouse or warehouses, which are now or may hereafter be located or doing business within this State, as above described whether said owners or operators reside within this State or not are public warehousemen within the meaning of this act and none of the provisions of this act shall be construed so as to permit discrimination with reference to the buying, receiving, and handling of grain of standard grades or in regard to parties offering such grain for sale, storage, or handling at such public warehouses, while the same are in operation." Section eleven is as follows: "The charges for storage and hauling (handling) grain shall not be greater than the following schedule: For receiving, elevating, insuring, delivering, and twenty days storage, two (2) cents per bushel. Storage rates after the first twenty days, one-half (½) cent for each fifteen days or fraction thereof, and shall not exceed five (5) cents for six months. The grain shall be kept insured at the expense of the warehousemen for the benefit of

the owner." Section twelve provides the penalty for violating the act by declaring that all persons "who shall violate the provisions of any section of this act or shall do or perform any act or thing therein forbidden, or who shall fail to do or keep the requirements as herein provided shall be deemed guilty of a misde-
70 meanor and shall on conviction thereof, be subjected to a fine of not less than two hundred (200) dollars, nor more than $1,000 and be liable in addition thereto to imprisonment for not more than one year at the State penitentiary at the discretion of the court." Section five of the act requires public warehousemen, as defined in the statute, to file a bond with the railroad commissioners for the faithful performance of their duties as public warehousemen.

On petition of the relator the district court granted an alternative writ of mandamus as follows: "The State of North Dakota to Norman Brass, respondent: Whereas the following facts have been made to appear to this court by the verified petition of the above-named relator, to wit: 1. That he is the relator in the above-entitled matter; that he owns and operates a farm containing 540 acres in the vicinity of the railroad station of Grand Harbor, in the county and State aforesaid, and during the year 1891 has raised on said farm about 4,000 bushels of grain, principally wheat. 2. That the relator has not sufficient storage capacity on his farm or elsewhere for said grain so raised as aforesaid, but is dependent almost wholly upon the grain elevators and warehouses in the vicinity of said farm for storage capacity. 3. That fully fifty per cent. of the grain raised in said Ramsey county, North Dakota, is dependent for storage capacity upon the grain elevators and warehouses at the various towns, villages, and railroad stations in said Ramsey county. 4. That the respondent, Norman Brass, is now and at all the time herein stated has owned and operated a grain elevator at the railroad station of Grand Harbor aforesaid for the purpose of buying, selling, storing, and shipping grain for profit. 5. That the relator on the 30th day of September, 1891, hauled fifty-eight bushels of wheat to the grain elevator of respondent, Norman Brass, at Grand Harbor aforesaid, and tendered the same at said elevator of said Norman
71 Brass for storage, and requested said Norman Brass to receive, elevate, insure, and store said grain for twenty days, and at the time tendered to said Brass two cents per bushel for compensation for receiving, elevating, insuring, and storing said grain for twenty days; that said grain when so tendered as aforesaid was dry and in a suitable condition for storage, and there was in said grain elevator of said Brass at Grand Harbor aforesaid at said time storage capacity for over twenty-five thousand bushels of grain not in use and wholly unoccupied. 6. That said Brass then and there refused to receive said grain for the purpose aforesaid and wholly refused to store said grain at said price. 7. That the relator endeavored to secure storage for said grain at the only other elevator in operation at said railroad station of Grand Harbor aforesaid, but said elevator refused to receive relator's grain upon the same ground as respondent. 8. That the relator is informed and believes that the owners of grain elevators and warehouses within a radius of fifty miles of Grand

Harbor aforesaid refuse to receive grain for storage at said price: Now, therefore, this court, in order that justice may be done in this behalf to him, Louis W. Stoeser, relator, does hereby command and enjoin you that immediately upon receipt of this writ you do receive from relator, while your storage capacity at your elevator herein mentioned is sufficient for that purpose, all grain that may be tendered you by the relator in a dry and suitable condition for storage at a rate of compensation not exceeding the following schedule, viz., for receiving, elevating, insuring, delivering, and twenty days' storage, two cents per bushel; storage rates after the first twenty days, one-half cent per bushel for each fifteen days or fraction thereof, and shall not exceed five cents for six months, or that you show cause to the contrary before this court at the court-house, in the city of Devil's Lake, Ramsey county, North Dakota, on the 5th day of October, 1891, at 10 o'clock in the forenoon of said day, or as
72 soon thereafter as counsel can be heard; and how you have executed this writ make known to this court at the time and place aforesaid, and have you then and there this writ.

Dated Sept. 30th, 1891.

D. E. MORGAN,
Judge District Court, Ramsey County, North Dakota."

To which writ appellant made return by answer as follows:

The return of the respondent to the alternative writ of mandamus issued in the above-entitled proceeding shows to the court—

1. That the respondent admits the truth of the facts pleaded in said alternative writ.

2. For a further return to the said alternative writ the respondent alleges that he owns and operates only one grain elevator in North Dakota or elsewhere; that the said elevator is the elevator mentioned in said alternative writ, and is situated at Grand Harbor, a small way station on the line of the Great Northern railroad, containing a population of less than one hundred people; that there are two other elevators owned and operated by different owners independently of and in competition with each other; that there are about six hundred grain elevators, flat-houses, and warehouses in said State of North Dakota at which grain is bought and shipped for profit, which said elevators, warehouses, and flat-houses are owned and operated by over one hundred and twenty-five different owners independent of and in competition with each other; that the owners of said elevators, warehouses, and flat-houses are individuals engaged in buying and shipping grain, millers who use their elevators to supply their mills with grain, farmers' shipping associations, elevator corporations, and individual farmers; that said elevators, flat-houses, and warehouses vary in cost of con-
73 struction from five hundred dollars to five thousand dollars and vary in capacity from five thousand to fifty thousand bushels; that there are from two to ten elevators, warehouses, and flat-houses operated and owned each by different owners and operators at every station in North Dakota at which grain is marketed;

that land upon which it is practicable to erect other elevators at every station in North Dakota at which grain is marketed is unlimited in area and can be readily purchased at prices varying from one dollar and twenty-five cents per acre to forty dollars per acre; that respondent's said elevator cost, when constructed and fully equipped, about three thousand dollars; that the capacity of the same is about 30,000 bushels.

That respondent's principal business is that of buying wheat at Grand Harbor, North Dakota, and shipping the same to and selling it at Minneapolis and Duluth, Minnesota, to which business that of storing grain for third persons has been a mere incident.

That all grain purchased by respondent at his said elevator is purchased for the sole purpose of being shipped to and sold at and is shipped to and sold at Minneapolis and Duluth, Minnesota.

That respondent in the conduct of his said business contracts with millers and other purchasers of grain at said Minneapolis and Duluth to sell and deliver to said persons at a future and fixed date certain quantities of wheat and operates and maintains his said elevator for the exclusive purpose of purchasing grain to fill said contract.

That in seasons when the grain yield is light and railroad facilities are such as to enable grain to be moved rapidly there is space and storage capacity in respondent's elevator in excess of that used by respondent's grain, and particularly when respondent's contracts for the sale of grain are small, while at other times, when the yield is enormous, as in the present year, respondent's contracts are
74 large, and the quantities of grain presented for shipment are beyond the capacity of the railroads to move, there is not sufficient storage capacity in respondent's elevator to hold and store the grain purchased by respondent in the conduct of his said business.

That there are located in Minneapolis and Duluth, Minnesota, a great many corporations, persons, and copartnerships engaged in a business known as the "grain commission" business.

That these grain commission houses have swarms of agents traveling throughout the State of North Dakota, going from town to town and farm to farm, purchasing grain from farmers in some instances and in others soliciting farmers to ship their grain to said houses at Minneapolis or Duluth, Minnesota, to be by the latter sold on commission.

That none of said grain commission houses have or own any storage capacity in North Dakota.

That if chapter 126 of the Laws of 1891 is valid and its effect is to compel respondent to receive all grain that may be tendered to him for storage by grain commission men, farmers, grain speculators, and others, without reference to the necessities or condition of respondent's business at any particular time, the entire storage capacity of respondent's elevator will be exhausted in storing grain for third persons, and the principal business of the respondent, to conduct which his capital was invested in said elevator, will be utterly ruined and annihilated for want of storage capacity to con-

tain wheat purchased by him to fill contracts made by him in the conduct of his said business, and respondent subjected to suits for damages for non-fulfillment of his said contracts.

That the relator only offered to pay respondent for the service which he requested him to perform the rate fixed by chapter
75 126 of the Laws of 1891—that is, two cents per bushel; that respondent refused to perform the service for less than two and one-half cents per bushel.

That respondent refuses to comply with the provisions of said chapter 126 on the ground that it abridges his privileges and immunities as a citizen of the United States; that it deprives him of his liberty and property without due process of law, and denies to him the equal protection of the laws and amounts to a regulation of commerce among the States.

That for thirteen years last past the rate charged for the storage of grain has been uniform at all elevators, flat-houses, and warehouses in North Dakota, and during that time did not exceed the following schedule: For receiving, elevating, insuring, delivering, and fifteen days' storage, two and one-half cents per bushel; after the first fifteen days, one-half cent per bushel for each fifteen days or part thereof, but not to exceed five cents per bushel for six months.

That the average farm in North Dakota does not exceed in area 160 acres; that the average yield in grain of a quarter section of land in North Dakota does not exceed twenty-five hundred bushels; that a granary sufficient in size to safely and securely store twenty-five hundred bushels of grain can be erected on any farm in North Dakota at a cost not exceeding one hundred and fifty dollars.

That the business of respondent and all other persons, firms, and corporations engaged in the business of operating grain elevators, warehouses, and flat-houses in North Dakota and the manner in which said business is conducted is not in any manner unwholesome or deleterious to the health, morals, welfare, or safety of the community or society.

That the railroad and warehouse commissioners of North
76 Dakota, on page 33 of their annual report to the governor for 1890, said: "In view of the fact that after thorough investigation the board deem the charges allowed by section 22, chapter 187 (Laws 1890), and also section 10 of said chapter, as unreasonable, the following rules of storage are recommended: 1. For receiving, elevating, insuring, delivering, and fifteen days' storage, two and one-half cents per bushel; 2, after fifteen days, one half cent per bushel for each fifteen days or part thereof, but not to exceed five cents for six months."

That the rates referred to by said commissioners as unreasonable were less than the rate recommended by said board.

That the respondent denies that the legislature has any power whatever to say whether he shall rent the bins in his elevator or not, and wholly denies the power of the legislature to say what he shall charge for the use of his said elevator or the bins therein.

That since the enactment of section nine of chapter 126 of the

Laws of 1885 the amount of grain shipped directly by farmers without the intervention of elevators, warehouses, or flat-houses has been increasing, and in 1890, as respondent is informed and believes, nearly fifty per cent. of the entire grain product of North Dakota was shipped to Minneapolis and Duluth, Minnesota, by farmers; that the amount of grain shipped in that manner is steadily increasing from year to year.

That pursuant to section 7 of chapter 122, Laws of 1890, the railroad commissioners adopted and published the following rules to govern the distribution of cars and other freight, which rules are now in operation in said State of North Dakota, to wit:

"STATE OF NORTH DAKOTA,
OFFICE OF COMMISSIONERS OF RAILROADS.

Rules for the distribution of cars between stations and shippers.

77 1. In distributing cars to stations for grain loading they shall be distributed according to the daily average shipments from such stations.

2. In distributing cars to shippers for grain loading at stations agents shall first fill each shipper's order for one car to each. After this is done the balance of the cars shall be distributed among shippers according to the amount of grain in sight offered for shipment by each shipper.

3. Parties desiring to load grain on track shall be furnished cars and shall be allowed for loading time twenty-four hours from the time the car is set on the side track to complete loading and furnish shipping directions. In case shipper fails to complete loading or furnish shipping directions within twenty-four hours, then, in such case, the railway company may collect upon such cars $3.00 rental for each and every day or part of a day which such cars are delayed after twenty-four hours.

The above rule as to time and rental charges shall also apply to grain delayed in unloading on track."

In connection with said rules in said report said commissioners said: "We believe that the railroads have labored faithfully to supply cars to shippers, in accordance with these rules, and, so far as their ability to supply the demand permitted, cars have been distributed in conformity therewith. From September 15th to December 15th the demand for cars is double the ability of the roads to supply, and as a necessary consequence delay in supplying cars must ensue. In all cases of complaint as to failure to get cars investigated this year this has been the case and cars have been supplied as soon as possible by the railroad companies.

The liberal policy of the railroads in the distribution of cars adopted this year has been of great benefit to the farmers of North Dakota."

Wherefore respondent demands judgment quashing the
78 alternative writ of mandamus, dismissing this proceeding,

and for his costs and disbursements laid out and expended in this action

Dated this 5th day of October, 1891.

JOHN W. MAHER,
Attorney for Respondent."

The relator interposed a general demurrer for insufficiency to the answer, and after a hearing upon the issue of law raised by the demurrer the district court ruled that the demurrer be sustained. The appellant having made his election to stand upon the answer, the trial court ordered and adjudged that the peremptory writ be issued as prayed for, and from this order an appeal is taken to this court. The principal assignments of error are as follows: "1. That the court erred in sustaining the relator's demurrer to the appellant's answer and return. 2. That the court erred in holding chapter 126 of the Laws of 1891, and particularly section eleven of that chapter, constitutional.

The grain elevator and warehouse in question, as described in the alternative writ as well as in the answer thereto, is confessedly a building which falls within the statutory definition of "public warehouses," and the appellant, as sole owner and manager of the elevator and of the grain business carried on within it, at the inception of this proceeding and long prior thereto was clearly a "public warehouseman" within the terms and meaning of the statute. The answer admits and alleges that "respondent's (appellant's) principal business is that of buying wheat at Grand Harbor, North Dakota, and shipping the same to and selling it at Minneapolis and Duluth, Minnesota, to which business that of storing grain for third persons is and always has been a mere incident." From this it appears that appellant's warehouse as well as his grain business are es-
79 sentially within the terms and definitions of the act in question. See section 4, chapter 126, above quoted.

The answer in terms admits all matters of fact set out in the alternative writ, and the demurrer to the answer admits all facts which are well pleaded in the answer to the writ; hence any averments of mere fact which are embodied in both the writ and the answer are admitted of record to be true as pleaded.

It appears that the object of the proceeding is to compel the appellant, as a public warehouseman, to store the relator's grain in appellant's warehouse and grain elevator at the rate of compensation fixed by section eleven of the statute. This appellant refused to do on demand and tender of the prescribed rate of compensation. Appellant's refusal to receive the grain into his warehouse is not based upon any alleged inadequacy of the statutory rate, but was *placed* solely upon the ground that he was unwilling to lower his charges for storage below the sum he had been receiving in prior years for the same service. Appellant had empty space in his warehouse which was available, and he was willing, as a matter of business, to receive and store the grain, but was unwilling to reduce his charges under legislative dictation. Appellant denies the validity of chapter 136, and especially section eleven thereof, and bases his

defense wholly upon constitutional grounds, thinking that the statute is invalid because it deprives him of the free, untrammelled use of his property without due process of law and deprives him of the equal protection of the law, as these fundamental rights are guarded against legislative encroachment by the constitution of the State and of the United States, citing section 13 of the constitution of this State and section 1 of the 14th amendment of the Constitution of the United States in support of his contention. Appellant has purposely limited his defense to the one question of legislative power to regulate his warehouse
80 business by prescribing rates. Nothing is alleged or claimed in argument tending to show that the prescribed rate would be non-compensatory, much less that it would operate practically to confiscate relator's business as a warehouseman and grain dealer. It distinctly appears, moreover, that when relator tendered his grain for storage not only that appellant owned and operated a grain elevator situated at the railroad station in question, but further appeared "that said grain when so tendered, as aforesaid, was dry and in a suitable condition for storage, and there was in said grain elevator * * * at said time storage capacity for over twenty-five thousand bushels of grain not in use and wholly unoccupied." The answer to the writ states the entire scope of appellant's contention in the paragraphs quoted below: "The respondent (appellant) refuses to comply with the provisions of said chapter 126 on the ground that it abridges his privileges and immunities as a citizen of the United States; that it deprives him of his liberty and property without due process of law and denies to him the equal protection of the laws and amounts to a regulation of commerce among the States; that the respondent denies that the legislature has any power whatever to say whether he shall rent the bins in his elevator or not, and wholly denies the power of the legislature to say what he shall charge for the use of his said elevator or the bins therein."

In further explanation of the particular points of this contention it should be noticed that at the argument appellant's counsel was careful to limit the discussion to the one question of legislative power to enact the statute, and particularly section eleven thereof, which prescribes a maximum schedule of rates for the storage of grain in public warehouses. Counsel did not claim in argument or otherwise that at the time in question the appellant was not en-
81 gaged in the business of storing grain for others nor pretend that the empty space then existing in his warehouse would be needed by appellant in the prosecution of his other business of buying, selling, and shipping grain. The record is silent as to relator's ulterior purposes in seeking storage for his wheat at appellant's elevator. Whether the storage was sought with a view to shipping the grain by rail to a market at some point within or without the State is not disclosed; nor can the court ascertain from the record or otherwise whether it was relator's purpose to hold the wheat in said elevator for sale at a favorable moment in the local or foreign market, or whether he intended the grain for his individual use, as seed or otherwise, and expected to demand and receive a

redelivery of the grain to himself at said grain elevator, as, under section 7 of said chapter 126, relator would have an option to do—*i. e.*, an option to demand a redelivery of the "kind, quality, and quantity of grain" placed in said elevator.

The foregoing explanations will suffice to develope the fact that the only question we are to determine in this case is one of legislative power with reference to the limitations of such power existing in the constitutions of the State and nation and hereinbefore referred to. The legislature, by section 4 of the statute, has declared that "all buildings, elevators, or warehouses in this State erected and operated or which may be hereafter erected or operated * * * for the purpose of buying, selling, storing, shipping, or handling grain for profit are hereby declared public warehouses." Other sections of the statute inaugurate a system of State surveillance over such public warehouses and "public warehousemen," and among other regulations is that particularly involved here, viz., that which fixes a maximum schedule of rates or charges for the storage of grain in said public warehouses for the different periods of time designated in the enactment. *Vide* section 11, *supra*. The
82 issues presented demand the consideration of questions of capital importance not only to the industrial and property interests within the State, but other questions even more grave and serious than those of property—questions which have to do with the fundamental rights of individuals—to life, liberty, and the pursuit of happiness, as such rights stand related to legislative power when acting within its proper constitutional sphere.

Before stating our conclusions upon the particular facts of the case under consideration we invite attention to the proposition of fact now familiar to the profession that, as a result of memorable forensic struggles and repeated judicial affirmations by courts of the highest rank in this country, both State and Federal, the right of legislative regulation and control over the business carried on in grain elevators and warehouses to the extent of prescribing their maximum rates of compensation has become firmly established and must now be regarded by the courts as beyond the realm of debate. Whatever the principles may be upon which such legislation is sustained, it is undeniable that it has been repeatedly sustained by the ablest courts in this country. True it is that dissenting opinions of marked ability have been affixed to the majority opinions in the cases where the doctrine has been enunciated, but the writer knows of no judicial authority denying the existence of the doctrine of legislative control. The doctrine was first broadly asserted in recent times in a noted case decided by the supreme court of the State of Illinois—Munn *vs.* People, 69 Ill., 80. The case arose under a statute which, in all essential feat-res, is the same as that under consideration. The statute was enacted to give force and practical effect to an amendment (section 1, article 13) of the State constitution, which reads as follows: "All elevators or storehouses where grain or other property is stored for compensation, whether the property stored be kept separated or not,

are declared to be public warehouses." This amendment
83 was adopted in 1870, and in 1871 the legislature of Illinois divided public warehouses into three classes, prescribed the taking of a license and the giving of a bond, and fixed a maximum charge for warehouses belonging to class A for storing and handling grain, including the cost of receiving and delivering, and prescribed a fine on conviction for taking rates in excess of that fixed in the statute and for not giving a bond or obtaining the required license. Munn and Scott possessed no corporate franchises, but as private persons were managers of a warehouse and elevator located at Chicago. They were convicted and fined for not taking out the license, not giving the bond, and for charging rates for storage and handling grain higher than the rates established by the act. The statute divided warehouses into classes and declared that it should be the duty of every warehouseman belonging to class "A" to receive into his warehouse any grain that might be tendered to him for that purpose. In short the statutory regulations of the warehouses belonging to class "A," in Illinois, were not materially different from the statutory regulations prescribed in chapter 126 of the Session Laws of 1891 and which are intended to apply to all warehouses and grain elevators within this State which come within the statutory definition of a public warehouse. The validity of the statute having been sustained by the supreme court of the State of Illinois, the case was removed by writ of error to the Supreme Court of the United States, and the contention there was that the statute was repugnant to the third clause of section 8 of article 1 of the Federal Constitution and to the fifth and 14th amendments thereof. The tribunal of last resort, in Munn *vs.* Illinois, 94 U. S., 113, affirmed the decision of the court below and fully sustained the constitutionality of the Illinois statute, two justices publishing their dissent. We refer to the two decisions of the Munn case already cited for a
84 more complete statement than can here be given of the particular facts upon which Munn was prosecuted under the statute of Illinois.

Turning now to the history of a case well known to the profession and arising in the State of New York, we find that a penal statute similar to that of Illinois above cited was approved by the governor of New York on June 9th, 1888. It is entitled "An act to regulate the fees and charges for elevating, trimming, receiving, weighing, and discharging grain by means of floating and stationary elevators and warehouses in this State." The following is the act: "§ 1. The maximum charge for elevating, receiving, weighing, and discharging grain by means of floating and stationary elevators and warehouses in this State shall not exceed the following rates, namely: For elevating, receiving, weighing, discharging grain, five-eighths of one cent a bushel. In the process of handling grain by means of floating and stationary elevators the lake vessels or propellers, the ocean vessels or steamships, and canal-boats shall only be required to pay the actual cost of trimming or shovelling to the leg of the elevator where unloading and trimming cargo when unloading. § 2. Any person or persons violating the provisions of this

act shall, upon conviction thereof, be adjudged guilty of a misdemeanor and be punished by a fine of not less than two hundred and fifty dollars and costs thereof. § 3. Any person injured by a violation of the provisions of this act may sue for and recover any damages he may sustain against any person or persons violating said provisions. § 4. This act shall not apply to any village, town, or city having less than one hundred and thirty thousand population. § 5. This act shall take effect immediately."

One Budd, who was engaged in the elevator business at Buffalo, New York, was indicted for violating the provisions of said statute and was charged in substance with exacting a greater sum for
85 elevator charges in unloading a cargo of grain and corn than the maximum compensation fixed by the statute. He was convicted and received a sentence imposing both fine and imprisonment. The case was removed to the court of appeals of New York, which affirmed the judgment of the superior court of Buffalo. People *vs.* Budd, 117 N. Y., 1. The Budd case, with two others arising in different parts of the State of New York, but under the same statute, were, by writ of error, removed to the Supreme Court of the United States. All three of the cases have been decided by the Supreme Court of the United States and an exhaustive opinion was handed down quite recently and since the case at bar was submitted for our determination. J. Talmon Budd, plaintiff in error, *vs.* The People of the State of New York and the two other cases are reported in the Sup. C't Rep. The tribunal of last resort, after citing numerous cases decided in State and Federal courts upholding the doctrine of legislative control over elevators and warehouses as a proper exercise of the internal police power inherent in every government, reaches the conclusion and so decides that the conviction of Budd and the defendants in the other cases must be sustained. This decision reaffirms and accentuates the broad doctrine of the right of State legislative control over warehouses and elevators which was announced October, 1876, sixteen years before, by the same court, in Munn *vs.* Illinois, 94 U. S., 113. After referring at length to the opinion of the learned court of appeals, People *vs.* Budd, 117 N. Y., 1, which seemed to cover every phase of the question, the Federal Supreme Court declares: "We regard these views which we have referred to as announced by the court of appeals of New York, so far as they support the validity of the statute in question, as sound and just." Proceeding, the court say: "This court in Munn *vs.* Illinois, the opinion being delivered by Chief Justice Waite, there being a
86 published dissent by two justices, considered carefully the question of the repugnancy of the Illinois statute to the fourteenth amendment. It said that under the powers of government inherent in every sovereignty the government regulates the conduct of its citizens one toward another and the manner in which each shall use his own property when such regulations become necessary for the public good, and that in their exercise it has been customary in England from time immemorial and in this country from its first colonization to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix

a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. It was added: "To this day statutes are to be found in many of the States upon some or all of these subjects;" and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. It announced as its conclusion that down to the time of the adoption of the fourteenth amendment it was not supposed that the statutes regulating the use or even the price of the use of private property necessarily deprived an owner of his property without due process of law; that when private property is devoted to a public use it was subject to public regulation; that Munn and Scott, in conducting the business of their warehouse, pursued a public employment and exercised a sort of public office, in the same sense as did a common carrier, miller, ferryman, innkeeper, wharfinger, baker, cartman, or hackneying coachman; that they stood in the very gateway of commerce and took toll from all who passed; that their business tended "to a common charge" and had become a thing of public interest and use; that the toll on the grain was a common charge, and that according to Lord Chief Justice Hale every warehouseman "ought to be under a public regulation,
87 viz., that he take but reasonable toll;" that there was no attempt to compel the owners of the warehouses to grant the public an interest in their property, but to declare their obligations if they used it in that particular manner; that it mattered not that Munn and Scott had built their warehouses and established their business before the regulations complained of were adopted; that, the property being clothed with a public interest, what was reasonable compensation for its use was not a judicial, but a legislative, question. The final conclusion of the court was that the act of Illinois was not repugnant to the Constitution of the United States, and the judgment was affirmed. The court quoted extracts from the cases cited below, showing conclusively that the precedent made in Munn *vs.* Illinois had been firmly adhered to and its doctrines frequently applied by the Supreme Court of the United States in later cases. Sinking Fund cases, 99 U. S., 700, 747; Spring Valley Water Works *vs.* Shattler, 110 U. S., 347–354; Wabash *vs.* Illinois, 118 U. S., 557–569; Dow *vs.* Beidleman, 125 U. S., 680–686; Chicago *vs.* Mervin, 135 U. S., 418–461. To show that the doctrine of Munn *vs.* Illinois had frequently been applied by the State courts the following cases are cited by the Supreme Court of the United States in its late opinion: Railway *vs.* Railway, 30 Ohio St., 604; State *vs.* Gas Company, 34 Ohio St., 572; Ruggles *vs.* People, 91 Ill., 256; Davis *vs.* State, 68 Ala., 68; Baker *vs.* State, 54 Wis., 368; Nash *vs.* Page, 80 Ky., 539; Girard Storage Co. *vs.* Southwick, 105 Pa. St., 248; Sawyer *vs.* Davis, 136 Mass., 239; Buchbill *vs.* Randall, 102 Ind., 528; Webster Telephone Case, 17 Neb., 126; Stone *vs.* Yazoo, 62 Miss., 607; Hackett *vs.* State, 105 Ind., 250; Cheasapeake & Potomac Telephone Co., 66 Md., 399; Delaware R. Co., 45 N. J. Eq., 50; Zanesville *vs.* Gas Co., 47 Ohio St., 1. The opinion further declares: "We are of the opinion that the act of the legisla-

ture of New York is not contrary to the fourteenth
88 amendment to the Constitution of the United States and does not deprive the citizen of his property without due process of law; that the act in fixing the maximum charges which it specifies is not unconstitutional, nor is it so in limiting the charge for shoveling to the actual cost thereof, and that it is a proper exercise of the police power of the State." The court further say: "On the testimony in the case before us, the business of elevating grain is a business charged with a public interest, and those who carry it on occupy a relation to the community analagous to that of common carriers. The elevator-owner in fact retains the grain in his custody for an appreciable period of time, because he receives it into his custody, weighs it, and then discharges it, and his employment is thus analagous to that of a warehouseman. In the actual state of the business the passage of the grain to the city of New York and other places on the seaboard would, without the use of elevators, be practicably impossible." In the course of its opinion the court took occasion to refer to the case of The Chicago, etc., Railroad Co. *vs.* Minnesota, 134 U. S., 418, and to say that the opinion of the court in that case did not overrule Munn *vs.* Illinois, as was claimed by Mr. Justice Bradley in his dissenting opinion. The court said: "But the opinion of the court did not say so, nor did it refer to Munn *vs.* Illinois, and we are of opinion that the decision in the case in 134 U. S., as will be hereafter shown, is quite distinguishable from the present case." Further on the court, in speaking of the Minnesota case, say: "That was a very different case from the one under the statute of New York in question, for in this instance the rate of charges is fixed directly by the legislature. See Spencer *vs.* Merchant, 125 U. S., 345. What was said in the opinion of the court in 134 U. S. had reference only to the case then before the court and to charges fixed by a commission appointed under an act
89 of the legislature, under a constitution of the State which provided that all corporations, being common carriers, should be bound to carry "on equal and reasonable terms;" and under a statute which provided "that all charges made by a common carrier for the transportation of passengers or property should be equal and reasonable." What was said in the opinion in the 134 U. S. as to the question of the reasonableness of the rate of charge being one for judicial investigation had no reference to a case where the rates are prescribed directly by the legislature. Not only was that the case in the statute of Illinois in Munn *vs.* Illinois, but the doctrine was laid down by this court in Wabash, etc., Railway Co. *vs.* Illinois, 118 U. S., 557, that it was the right of a State to establish limitations upon the power of railroad companies to fix the price at which they would carry passengers and freight, and that the question was of the same character as that involved in fixing the charges to be made by persons engaged in the warehousing business. So, to-, in Dow *vs.* Biedleman, 125 U. S., 680, it was said that it was in the power of the legislature to declare what should be a reasonable compensation for the services of persons exercising a public employment, or to fix a maximum beyond which any charge made would be unreasonable.

The Federal Supreme Court, without deciding whether it would under any circumstances assume to determine whether or not a maximum rate fixed by the legislature of a State was unreasonable, declared, referring to the New York cases, what may be said with equal truth and propriety of the case we are considering, viz: "The records do not show that the charges fixed are unreasonable." Nor do we feel called upon to anticipate what our conclusions might be in a case where it is made to appear that a rate of compensation prescribed by statute is so inadequate that its practical effect
90 would be to deprive the warehouseman of his property without due process of law, or so inadequate as to be non-compensatory in amount.

In its recent opinion above cited the Supreme Court of the United States quoted at length and with marked approval the clear and emphatic language employed by the court of appeals of the State of New York in People *vs.* Budd, wherein that learned court repeatedly gave its sanction to the governmental power, upon which the warehouse laws of Illinois and New York are based and upon which such laws can alone be sustained as constitutional laws, viz., the internal police power. While the courts cautiously avoid all attempts to circumscribe this all-pervasive power by definitions descriptive of its entire scope and utmost boundaries, it is also true that the courts of this country recognize the existence of such power as a fact and as an essential element in all orderly government. In a case properly within the police power of the State, the exercise of that power by the legislature is as vitally important and as essentially constitutional as the exercise of any other governmental power whatsoever. The Supreme Court of the United States, referring to the views of the court of appeals, say: "The court of appeals said that in view of the foregoing exceptional circumstances the business of elevating grain was effected with a public interest, within the language of Lord Chief Justice Hale, in his treatise De Partibus Maris (Harg. Law Tracts 78); that the case fell within the principle which permitted the legislature to regulate the business of common carriers, ferrymen, hackmen, and interest on the use of money; that the underlying principle was that business of certain kinds hold such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation, and that the court rested the power of the legislature to control and regulate elevator charges upon the nature and extent of the busi-
91 ness, the existence of a virtual monopoly, the benefit derived from the Erie canal's creating the business and making it possible, the interest to trade and commerce, the relation of the business to the property and welfare of the State, and the practice of legislation in analogous cases, collectively creating an exceptional case and justify legislative regulation."

It therefore appears that in the legislatures of the States of Illinois and New York the power exists under constitutional restrictions substantially the same as those existing in North Dakota to control the business transacted in elevators and grain warehouses to the extent at least of prescribing the maximum charges for storing

and elevating grain. It follows that the same power exists and may be exercised in North Dakota if like or similar conditions to those found in the other States mentioned exist here. Nor are the same or similar conditions here indispensible to the existence or to the exercise of legislative control over the warehouses and grain elevators of this State. The police power inheres in our State government and may be put forth by the legislature within the limitations of the constitution, nor does the exercise of such power at all depend upon whether the police power has been previously asserted in a similar manner and over the same conditions and subject-matter in other States. It may, indeed, become vitally important in the progressive development of our peculiar local industries to assert the legislative authority over departments of business which never before have been subject to legislative control. Should a new exigency arise in North Dakota the power to meet it by appropriate legislation will be found in our State government as it has been found in other States; but in the case at bar we think no new departure is necessary. In our judgment this case falls clearly within the reasoning of the two leading warehouse cases arising in the States of Illinois and New York, already cited. While the conditions in the other States
92 differed somewhat in details, we think they were substantially similar to the conditions existing in North Dakota which led to the enactment of chapter 126 of the Laws of 1891, and we are clear that the principle which has justified the legislation in the other States can be invoked here. The appellant's grain elevator may be taken as fairly representative of the "six hundred grain elevators, flat-houses, and warehouses" which, it appears by the answer, exist in North Dakota. It stands at a railroad station, adjoining the track, which track leads to a market within and without the State; its uses are numerous and varient and all of its uses are closely connected with the principle productive industry of this State, viz., that of grain-raising for shipment to market. In the shipping season an agent of the elevator can always be found in attendance there to receive, weigh, grade, and distribute the grain—principally wheat—in different compartments in the building, according to the grade to which it belongs. Usually the proprietor of the elevator is himself a buyer of grain as well as a warehouseman, and the station where the elevator is located is practically the only place in the vicinity or for miles around where the producer can find either storage or a buyer for his grain. It is conceived to be important to the seller that this grain should be in hand and accessible at the railroad station, where it can be disposed of on any day when the market is favorable or when necessity compels a sale. The elevators and warehouses of the State have grown up as an inseparable adjunct of the farming interests of the State; they reciprocally depend upon and sustain each other; it is, in fact, difficult to conceive of a system in which the peculiar grain raising and shipping industry of this State can be successfully carried on independently and without the practical co-operation of the elevators and warehouses located at

the stations. These structures are well adapted to the
93 uses for which they are built, and while it is true that the railroads in the State are required by statute to furnish box cars to those who may desire to ship in car-load lots, yet it appears in this case and it is a fact of common knowledge here that this mode of shipping grain is wholly inadequate as a means of transporting to market the surplus grain produced in this State where the yield is as large as it frequently has been in years past; nor is shipping by car-load lots so convenient to small producers, who more frequently than otherwise would be unable to hold a box car at a station long enough to enable them to haul their grain from a distance and fill such car. The course of business which has gradually grown up at the elevators is for the farmer to deliver his grain at the elevator, and there it is weighed and graded by the agent in charge. The farmer receives a warehouse receipt specifying the quantity and grade delivered, and thereafter the farmer never sees his wheat. It is shipped out from day to day to suit the convenience of the elevator. The farmer, if he so elects, can demand a redelivery of the same quantity of grain and of like quality as that specified on his receipt, but the amount of grain so redelivered is so small as to be non-appreciable. The mass of the grain put in the elevators at railroad stations moves out of the country by rail after being placed upon cars by instrumentalities provided by the elevators and adapted for that purpose.

With the existing limited facilities for storing, handling, and shipping grain in this State it is not an exaggeration to say that it would be impossible to market the larger part of the surplus grain raised in this State in any year of an average yield of wheat and other cereals without the aid of elevators and warehouses now standing at railroad stations and placed there for the express purpose of receiving, grading, and storing the grain and delivering it upon the cars. In brief, the elevators and warehouse-
94 indispensible auxiliaries of the producers in conveying their grain to market. These explanations, it is hoped, will suffice to show that the business carried on at the warehouses and elevators erected at the railroad stations in North Dakota has a relation to the entire public which is unique. Not only are these structures peculiarly related to the producers of the grain who deal with them directly, but they have an exceptional relation also to that larger public whose vital interests are inseparable from those of the producing class. It is true that our warehouses do not possess corporate privileges, and hence cannot be subjected to legislative control as legal monopolies, but they have such a large and decisive work to do in the matter of transferring grain from the hands of the producer to the common carrier and to the buyer that their business has a relation to the public which is peculiar to them and which lifts their business out of the common business pursuits of our people and places it in a separate class. We adopt and approve the language of the court in Ruggles *vs.* The People, 91 Ill., 256: "The legislature of this State has the power, under the constitution, to fix a maximum rate of charges by individuals as common carriers,

warehousemen, or others exercising a calling or business public in its character or in which the public have an interest to be protected against extortion or oppression."

We deem it superfluous to cite additional authority in support of our conclusions. We are not unaware of the fact that the right of legislative control of any kind of business is liable to abuse, but it is equally a matter of common observation and one abundantly verified by history as well as by current events that the untrammelled right of individuals or corporations to make their own charges for services which are indispensible to the public is likewise liable to abuse. There are many checks and safeguards which surround the property and the liberties of the citizen which will operate powerfully to prevent any-
95 thing like a wholesale assumption of paternal authority over the citizen or over business pursuits. Before any business can be severed from the mass of private occupations and be made subject to legislative regulation there must first be a popular demand for such control, chrystalizing into law, and when a statute is enacted which assumes control the citizen has a right of appeal to the courts and the courts have authority to annul as unconstitutional any statute which erroneously assumes to declare a business to be impressed with a public character when in fact it is only a private pursuit. The court of appeals of New York well said "that no serious invasion of constitutional guaranties by the legislature could withstand for a long time the searching influence of public opinion, which was sure to come, sooner or later, to the side of law, order, and justice, however it might have been swayed for a time by passion or prejudice or wh-tever aber-ations might have marked its course." Without further amplification, we unhesitatingly declare and so hold that the warehouse and elevator business as conducted in this State is a "business peculiarly affected with a public interest," and as such is subject to legislative regulation to the extent of fixing a maximum rate of charges for storing and handling grain in the public warehouses.

One further consideration may be mentioned. If the court entertained doubt of the constitutionality of chapter 126 of the Laws of 1891 much more serious than we do in fact entertain, we should yet deem it to be our duty to give the statute the benefit of such doubt. This course is in accord with an established rule of statutory construction. State *vs.* Fraser, 1 N. D., 425 Besides, by overruling constitutional objections urged against the statute the case will be in a position to be reviewed by the Supreme Court of the United States, while, on the other hand, should we declare against the validity of the statute no such review could be had. The whole
96 people will cheerfully acquiesce in the conclusions reached by the court of dernier resort, and we are glad to be able conscientiously to so determine the case as to facilitate its review in that court.

We have limited our inquiries and conclusions to the one matter of the right of legislative control of public warehouses and elevators to the extent of prescribing maximum charges and have not

considered possible questions which under other averments of fact might arise touching the validity and binding force of the rules and regulations prescribed by the commissioners for the government of the public warehouses of the State. We think no such question can legitimately arise under the pleadings and no such question is presented in the briefs of counsel.

The order sustaining the demurrer to appellant's answer and directing the peremptory writ of mandamus to issue is affirmed. It will be so ordered.

Bartholomew, J., concurs.

(Signed) ALFRED WALLIN.
J. M. BARTHOLOMEW.

97 CORLISS, *C. J.*, concurring specially:

I agree to the judgment in this case with reluctance. I am of opinion that the doctrine of the Munn and Budd cases is unsound. I admit that all authority is in favor of the opinion in this case, but I have an abiding conviction that the dissenting opinions in the Munn and Budd cases embody the true conception of American liberty. While it is true as an abstract proposition that the State courts may give to that liberty a wider scope than the Federal courts give to it, yet the question is so national in its character that it occurs to me that there should be only one rule for the whole nation. That rule, of course, must be for the present, and while those cases stand, the rule that the nation's highest tribunal enunciated in the Munn case and which it has very recently affirmed in the Budd case in the most emphatic manner, although by a bare majority. Liberty should not be one thing under the Federal Constitution and an entirely different thing under a State constitution containing the same guaranties, couched in the same language and written in the same spirit. The mind cannot conceive of a question more purely national in its character than the extent of that liberty which is the birthright of every citizen in every State and Territory in the land. It is one of the fundamental rights—not one thing in one State or section and something different in another State or section, but an all-pervading principle interwoven with the very structure of our polity, State and national. The nation was builded that all of its citizens might enjoy a distinctively American liberty. To the nation's tribunal the people committed the preservation of that liberty against State encroachment by the fourteenth amendment. By this very act the people lifted the question from one of State control into the broader field of national control. In its essential nature it was national before, although prior to that time each State might
98 by its own constitution have settled for itself the boundaries of that liberty. Not so now. The right to trace those boundaries is now lodged with the Federal Supreme Court. The question of liberty being national in its character, the spirit of the fourteenth amendment is that the nation's court shall determine the scope of that liberty, that it may be the same throughout the nation. The mere want of power in the Federal Supreme Court to compel the State courts to give the citizen no greater liberty than the former

court accords him affords no reason why such courts should refuse to follow the line of less extended liberty drawn by the Federal court. While there is great difference between the facts of the case and the facts in the Munn and Budd cases, it may be that this difference is not of such a nature as to distinguish this case from those in principle. My associates are clear on this point. I confess that I have doubts about it. My views, however, cannot affect the decision and the Federal Supreme Court must ultimately determine this question. Whatever I think about it will be of no weight before that court, which must settle for itself the limits of the doctrine it has enunciated. If that doctrine is to be much extended I greatly fear that our boast of liberty will be found "full of sound and fury, signifying nothing." I could add nothing to what has been said in the dissenting opinions in those cases with such power of reasoning, nor do I regard this as the court in which to express a dissent as to the doctrine. Such dissents are proper in that court which ought to declare the rule on this subject for the whole nation in all its courts, State and national.

No question of the reasonableness of the statutory compensation is involved. The issue is purely one of power. No other point is before us on this record. Yielding my individual judgment to higher authority, to which I feel it my duty to submit, I agree to the affirmance of the judgment.

(Signed) GUY C. H. CORLISS.

99 STATE OF NORTH DAKOTA, } ss:
In Supreme Court, }

I, R. D. Hoskins, clerk of the supreme court within and for the State of North Dakota, do hereby certify that the above and foregoing is a full, true, correct, and complete transcript and copy of opinion of the supreme court of the State of North Dakota in the above-entitled action, wherein State of North Dakota *ex rel.* Louis W. Stoeser is plaintiff and res. *versus* Norman Brass, defendant and app., as the same now remains of file in said court.

Seal Supreme Court, State of North Dakota.

In witness whereof I have hereunto set my hand and affixed the seal of the said court this 23d day of May, A. D. 1892.

R. D. HOSKINS, *Clerk.*

100 Supreme Court of the United States.

NORMAN BRASS, Plaintiff in Error,
vs.
THE STATE OF NORTH DAKOTA *ex Rel.* LOUIS W. STOESER, Relator, Defendant in Error.

STATE OF NORTH DAKOTA, } ss:
County of Ramsey, }

John F. Cowen, being first duly sworn, on oath states that on the fifth day of March, A. D. 1892, he filed the original writ of error in

the above-entitled action with the clerk of the district court of Ramsey county, North Dakota, in his office, in the city of Devil's Lake, in said county, and that affiant at the same time lodged a copy of the writ of error and the original citation herein, together with the bond given in this action and approved by the Honorable David J. Brewer, associate justice of this court, with said clerk, at his office aforesaid.

Affiant further says that there are now on file in the office of said clerk of said district court the record of the proceedings of the supreme court of the State of North Dakota in the action entitled "State of North Dakota *ex rel.* Louis W. Stoeser *vs.* Norman Brass."

JOHN F. COWEN.

Subscribed and sworn to before me this 26th day of June, 1892.

[Seal Clerk of the District Court, Ramsey County, North Dakota.]

T. C. SAUNDERS,
Clerk of the District — of Ramsey County, North Dakota.

101 UNITED STATES OF AMERICA:

The President of the United States to the State of North Dakota and Louis W. Stoeser, relator, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the district court of the second judicial district of the State of North Dakota, within and for Ramsey county, wherein Norman Br-ss is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 7th day of June, in the year of our Lord one thousand eight hundred and ninety-two.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

Due and personal service of a true copy of the above citation is hereby admitted this — day of June, 1892.

——— ———,
Attorney for Defendant in Error.

[Endorsed:] Ramsey county, North Dakota. Filed in the office of the clerk of district court this 27 day of June, 1892. T. C. Saunders, clerk of dist. cour-.

102 STATE OF NORTH DAKOTA, } ss:
County of Cass, }

O. G. Barnes, being first duly sworn, on oath states that he is the deputy sheriff of Cass county, North Dakota; that on the 20th day of June, 1892, at Fargo, Cass Co., North Dakota, he served the an-

nexed citation upon the Honorable Andrew H. Burke, governor of North Dakota, by delivering to and leaving with said party a true and correct copy of said original citation and at the same time exhibited to said party so served as aforesaid the original citation, with the signatures of the Honorable David J. Brewer attached thereto.

O. G. BARNES.

Subscribed and sworn to before me this 20th day of June, 1892.

[Seal District Court, Cass County, State of North Dakota.]

L. W. SCHRUTH,
Clerk Dist. Court, Cass County, North Dak.,
By H. J. HANSEN, *Dep.*

[Endorsed:] Ramsey county, North Dakota. Filed in the office of the clerk of district court this 27th day of June, 1892. T. C. Saunders, clerk of dist. cour-.

103 STATE OF NORTH DAKOTA, } *ss:*
County of Cass, }

D. A. McLaren, being first duly sworn, on oath states that he is the deputy sheriff of Cass county, North Dakota; that on the 23d day of June, 1892, at Fargo, Cass county, North Dakota, he served the annexed citation upon the Honorable C. A. M. Spencer, attorney general of North Dakota, by delivering to and leaving with said party a true and correct copy of said original citation and at the same time exhibited to said party so served as aforesaid the original citation, with the signatures of the Honorable David J. Brewer attached thereto.

D. A. McLAREN.

Subscribed and sworn to before me this 23rd day of June, 1892.

[Seal Oscar G. Barnes, Notary Public, State of North Dakota.]

OSCAR G. BARNES,
Notary Public, Cass County, North Dak.

[Endorsed:] Ramsey county, North Dakota. Filed in the office of the clerk of district court this 27 day of June, 1892. T. C. Saunders, clerk of dist. cour-.

104 In Supreme Court of the United States.

NORMAN BRASS, Plaintiff in Error,
vss.
THE STATE OF NORTH DAKOTA *ex Rel.* LOUIS W. STOESER, Relator,
Defendant in Error.

Due service of the writ of error and citation in the above-entitled action admitted this 23d day of June, 1892.

JAS. F. O'BRIEN,
Attorney for Defendant in Error.

[Endorsed:] Ramsey county, North Dakota. Filed in the office of the clerk of district court this 27 day of June, 1892. T. C. Saunders, clerk of dist. cour-.

104½ [Endorsed:] Original. State of North Dakota, county of Ramsey. In district court, 2nd judicial district. State of North Dakota *ex rel.* Louis W. Stoeser, relator, *vs.* Norman Brass, respondent. Citation. James F. O'Brien, att'y for relator. J. F. McGee, att'y for respondent.

105 UNITED STATES OF AMERICA:

The President of the United States of America to the honorable the judge of the district court of the second judicial district of North Dakota within and for Ramsey county, in said State, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court of the second judicial district of North Dakota within and for Ramsey county, in said State, being possessed of the record and proceedings upon a remittitur from the supreme court of the State of North Dakota, before you, being the highest court of law or equity of said State in which a decision could be had in the said suit between The State of North Dakota on the relation of Louis W. Stoeser, plaintiff, and Norman Brass, defendant, wherein was drawn in question the validity of a statute of said State of North Dakota on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity, a manifest error hath happened, to the great damage of the said Norman Brass, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second day of July next, in the said Supreme Court to be then and there held, that, the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this seventh day of June, in the year of our Lord one thousand eight hundred and ninety-two.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

Dated June 7th, 1892.

9—1103

[Endorsed:] Ramsey county, North Dakota. Filed in the office of the clerk of district court this 27 day of June, 1892. T. C. Saunders, clerk of dist. cour-.

106 STATE OF NORTH DAKOTA, } ss:
County of Cass, }

O. G. Barnes, being first duly sworn, on oath states that he is the deputy sheriff of Cass county, North Dakota; that on the 20th day of June, 1892, he served the annexed writ of error upon the Honorable Andrew H. Burke, governor of the State of North Dakota, by delivering to and leaving with said party a true copy of said writ of error.

Affiant further says that at the time of the service of said writ of error aforesaid he exhibited to said party the signature to said original writ of error.

O. G. BARNES.

Subscribed and sworn to before me this 20th day of June, 1892.

[Seal District Court, Cass County, State of North Dakota.]

L. W. SCHRUTH,
Clerk Dist. Court, Cass County, North Dak.,
By H. J. HANSEN, *Dep.*

[Endorsed:] Ramsey county, North Dakota. Filed in the office of the clerk of district court this 27 day of June, 1892. T. C. Saunders, clerk of dist. cour-.

107 STATE OF NORTH DAKOTA, } ss:
County of Cass, }

D. A. McLaren, being first duly sworn, on oath states that he is the deputy sheriff of Cass county, North Dakota; that on the 23rd day of June, 1892, he served the annexed writ of error upon the Honorable C. A. M. Spencer, attorney general of North Dakota, by delivering to and leaving with said party a true copy of said writ of error.

Affiant further says that at the time of the service of said writ of error aforesaid he exhibited to said party the signatures to said original writ of error.

D. A. McLAREN.

Subscribed and sworn to before me this 23rd day of June, 1892.

[Seal Oscar G. Barnes, Notary Public, State of North Dakota.]

OSCAR G. BARNES,
Notary Public, Cass County, North Dak.

[Endorsed:] Ramsey county, North Dakota. Filed in the office of the clerk of district court this 27 day of June, 1892. T. C. Saunders, clerk of dist. cour-.

108 STATE OF NORTH DAKOTA:

Supreme Court.

STATE OF NORTH DAKOTA *ex. Rel.* LOUIS W. STOESER, Relator,
vs.
NORMAN BRASS, Respondent.

I, Guy C. H. Corliss, chief justice of the supreme court of North Dakota, do hereby certify that on the trial of the above-entitled action in the above-entitled court the questions raised by appellant's counsel and decided by the court were whether chapter 126 of the Laws of 1891 of the State of North Dakota were in conflict with each of the several provisions of the fourteenth amendment of the Constitution of the United States.

GUY C. H. CORLISS,
Chief Justice Supreme Court, State of North Dakota.

[Endorsed:] Ramsey county, North Dakota. Filed in the office of the clerk of district court this 27th day of June, 1892. T. C. Saunders, clerk of dist. cour-.

109 In the Supreme Court of the United States.

NORMAN BRASS, Plaintiff in Error,
vs.
THE STATE OF NORTH DAKOTA *ex. Rel.* LOUIS W. STOESER, Defendant in Error.

STATE OF NORTH DAKOTA,
County of Ramsey.

OFFICE OF CLERK OF THE DISTRICT COURT OF RAMSEY COUNTY, NORTH DAKOTA.

Be it remembered that on the 7th day of June, A. D. 1892, a writ of error in the above-entitled action issued to the honorable the judge of the district court of the second judicial district of the State of North Dakota within and for Ramsey county, in said State, out of and under the seal of the Supreme Court of the United States; Whereupon, among other things, it was commanded of the said district court of the second judicial district of the State of North Dakota within and for Ramsey county, in said State, that it openly, under its seal, send the record and proceedings upon the remittitur from the supreme court of the State of North Dakota in a suit between The State of North Dakota on the relation of Louis W. Stoeser, relator, and Norman Brass, respondent, together with all things concerning the same, to the said the Supreme Court of the United States.

Therefore, pursuant to the said writ of error so issued as aforesaid, I, T. C. Saunders, clerk of the district court of the second judicial district of the State of North Dakota within and for Ramsey county, North Dakota, do hereby certify that the preceding record contains

a true and correct transcript of the record and proceedings in said action in the district court of the second judicial district of the State of North Dakota within and for Ramsey county, in said
110 State, and in the supreme court of said State of North Dakota.

And I further certify that each paper hereinbefore mentioned is a true, exact, and literal copy of the original thereof now on file in my office.

And I further certify that on the appeal in this action to the supreme court of the State of North Dakota the original record in this case was transmitted by me to that court pursuant to law, and was by said supreme court, after the termination of said action in said court, remitted to this court, where said original record now remains.

And I further certify that the copy of the bond included in the foregoing papers on pages 32, 33, and 34 is a true, correct, and literal copy of the bond approved by the Hon. David J. Brewer on the 16th day of June, 1892, as the said original bond now remains on file in this office.

And I further certify that the accompanying opinion of the supreme court of the State of North Dakota in this action, duly certified by the clerk of said supreme court, was filed in this office by the plaintiff in error, and the same is hereby transmitted to the Supreme Court of the United States pursuant to the request of the plaintiff in error and in obedience to the rules of said court.

And I further certify that the foregoing assignment of errors are the original assignments of errors filed in this court by the plaintiff in error.

And I further certify that the original writ of error, together with a copy of the same, was duly lodged and filed in this office, together with the original citation herein and the bond in this case approved by the Hon. David J. Brewer, associate justice of this court, on the 16th day of June, 1892, and now remains on file therein.

Dated June 27th, 1892.

[Seal Clerk of the District Court, Ramsey County, North Dakota.]

T. C. SAUNDERS,
Clerk of the District Court of the Second Judicial District in and for Ramsey County, State of North Dakota,
By —— ——, *Deputy.*

Endorsed on cover: Case No. 15,073. North Dakota 2nd judicial district court, Ramsey county. Term No., 1103. Norman Brass, plaintiff in error, *vs.* The State of North Dakota *ex rel.* Louis W. Stoeser. Filed July 2nd, 1892.

153 U.S.
153-391

FILED.
MAR 5 1894
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 768.

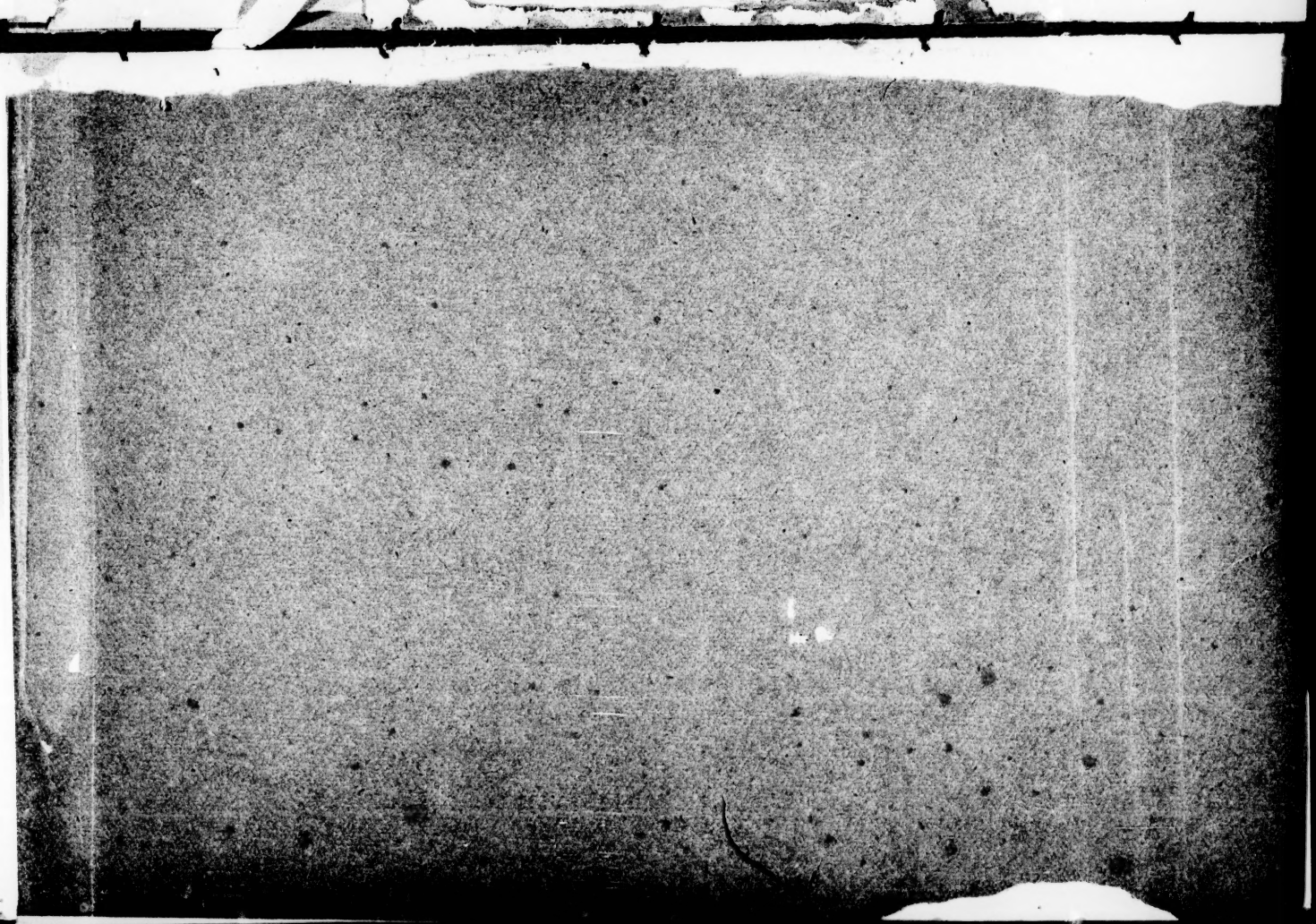
NORMAN BRASS, PLAINTIFF IN ERROR,

vs.

STATE OF NORTH DAKOTA, EX REL. LOUIS W. STOESER.

Stipulation of Jas. F. O'Brien and Affidavit of W. H. Standish.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1894.



Supreme Court of the United States.

OCTOBER TERM, 1893.

NORMAN BRASS, PLAINTIFF IN ERROR,

v.

STATE OF NORTH DAKOTA, EX. REL. LOUIS W. STOESER, DEFENDANT IN ERROR.

Stipulation.

I, J. F. O'Brien, an attorney at law, of the city of Devils Lake, in the county of Ramsey and State of North Dakota, hereby affirm and ratify the stipulation herein signed by C. D. O'Brien, an attorney at law, of St. Paul, Minnesota, authorizing the State of North Dakota to intervene herein, and its attorney-general and other counsel to file a supplemental showing to the record heretofore made showing that Norman Brass, plaintiff in error, from the time he built upon the right of way the elevator set out in the record herein, was under contract with the railroad company to perform all the things that should be required of him as a public elevator-man by the statutes of North Dakota; and that said State by its attorney-general and other counsel might file a brief herein and have said case argued before the above court.

Dated at Devils Lake, N. D., January 9th, A. D. 1894.

JAS. F. O'BRIEN.

UNITED STATES OF AMERICA,
State of North Dakota,
County of Burleigh, } ss:

William H. Standish, being first duly sworn, makes oath and says that the preceding stipulation contains the genuine signature of James F. O'Brien, an attorney at law, of Devils Lake, North Dakota, who is the person referred to by C. D. O'Brien, an attorney, of St. Paul, Minnesota, in the stipulation which the said C. D. O'Brien has filed in this action referred to above.

W. H. STANDISH.

Sworn to before me and subscribed in my presence this 12th day of January, A. D. 1894.

[SEAL.] W. H. B. EISENHUTH,
Notary Public, of North Dakota.

Office Supreme Court U. S.
FILED.
OCT 20 1893
JAMES H. McKENNEY,
CLERK.

15-3-391

Supreme Court of the United States.

OCTOBER TERM, 1893.

NORMAN BRASS,
PLAINTIFF IN ERROR,
v.
THE STATE OF NORTH DAKOTA
EX REL. LOUIS W. STOESER.

No. 768.

Motion to Vacate Submission, &c., with Stipulation, Affidavits, and Exhibits.

THE LAW ASSOCIATION
OF
PHILADELPHIA.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1893.

Supreme Court of the United States.

OCTOBER TERM, 1893.

NORMAN BRASS,
PLAINTIFF IN ERROR,

v.

STATE OF NORTH DAKOTA, EX REL.
LOUIS W. STOESER,
DEFENDANT IN ERROR.

Case No. 15,073.
Term No. 768.

Stipulation.

It is hereby stipulated and admitted that the warehouse of the plaintiff in error is, and at all times since its construction has been, situated upon the right of way of the Great Northern Railway Company under a lease from said railroad company, of which the blank form of lease attached as Exhibit "A" to the affidavit of Hon. William H. Standish, attorney-general of North Dakota, filed with motion papers in the above-entitled action is a copy, except as to the written portions, which simply describe the real estate and name of the lessee.

It is further stipulated that the attorney-general may

be permitted to file a brief on behalf of the State of North Dakota in the above-entitled action.

(Signed) J. F. McGEE,
Attorney for Plaintiff in Error.
(Signed) C. D. O'BRIEN,
Attorney for Defendant in Error.

My signature to and execution of the above stipulation is subject to the written approval of and concurrence therein of J. F. O'Brien, of Devils Lake, N. D.

STATE OF NORTH DAKOTA, } ss:
County of Burleigh, }

William H. Standish, being first duly sworn, makes oath and says that he is the attorney-general for the State of North Dakota, and has his office in Bismarck, Burleigh county, North Dakota, and that he is one of the attorneys of the State of North Dakota in case No. 15,073, special term No. 768, October term, 1893, Supreme Court of the United States, wherein Norman Brass is plaintiff in error; and that J. F. McGee, who is attorney for said plaintiff in error, resides in the city of Minneapolis, in the State of Minnesota, and has his office thereat, and that there is a regular mail leaving daily from the said city of Bismarck to the said city of Minneapolis, and that on the 7th day of October, 1893, affiant deposited in the post-office at Bismarck, postage prepaid, a letter containing a full and true copy of the following motion, notice, and two affidavits of affiant with Exhibit A thereto attached, in said case, addressed to said McGee at Minneapolis, Minnesota.

W. H. STANDISH.

Sworn to before me and subscribed in my presence this 7th day of October, A. D. 1893.

[SEAL.] W. H. B. EISENHUTH,
Notary Public, North Dakota.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

NORMAN BRASS, Plaintiff in Error,
v.
THE STATE OF NORTH DAKOTA, ex rel. LOUIS W. STOESER, Defendant.

Case No. 15,073.
Term No. 768.

In Error to the Second Judicial Court of Ramsey County, State of North Dakota.

Notice.

To C. D. O'Brien, attorney at law, of St. Paul, Minnesota, and attorney for Louis W. Stoeser in the above-entitled suit, and to J. F. McGee, of Minneapolis, Minnesota, attorney for Norman Brass, plaintiff in error in the above-entitled cause.

GENTLEMEN: Please take notice that the State of North Dakota, at request of its governor and attorney-general, through its attorney-general, who has been admitted to practice in the United States Supreme Court, or some other attorney authorized to practice in said Court, on Monday the 16th day of October A. D., 1893, at 12 M., at the opening of the Supreme Court of the United States on that day or as soon thereafter as counsel can be heard, the State of North Dakota in the above-entitled case will apply to the said Court by motion, a copy of which is herewith served on you as a part hereof, and that then and there it will ask that the record in the case be amended so as to incorporate into it the lease form of contract appended to an affidavit of W. H. Standish herewith served on you, which affidavit will then and there be offered in evidence, and that said Court permit evidence to be taken of the officers of the Great Northern Railway at St. Paul, Minnesota, to wit, of its solicitor, M. D.

Grover, of said city of St. Paul, of its president, its auditor, and its right-of-way agent, and divers other persons, to show the terms of the original contract under which the said plaintiff in error, or his assignor or assignors, constructed the elevator described and involved in this case, and for such other relief in said order as the said State is entitled to receive herein.

Also that you and each of you are hereby notified to produce the original contract (if you or your client have the same) at the said hearing of the said motion, to be then and there inspected by the said Court and to be offered in evidence and made a part of this record herein.

Dated at Bismarck, September 27th, A. D. 1893.

E. C. D. SHORTRIDGE,
Gov. N. Dak.

W. H. STANDISH,
Att'y-Gen'l of North Dakota
and Att'y herein for said State.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

NORMAN BRASS, Plaintiff in Error,
v.
THE STATE OF NORTH DAKOTA, ex rel. LOUIS W. STOESER, Defendant. } *No.* 768.

In Error to the Second Judicial Court of Ramsey County, State of North Dakota.

Motion filed by the State of North Dakota Asking Leave to Intervene and Supply Material Omitted Parts of the Record.

The State of North Dakota, by and through its governor and attorney-general, now comes and applies to

this Court for leave to intervene and supply material parts to the record herein that have been omitted for the reason that the matter involved concerns the public more largely than it does either of the parties now before the Court; and for the further reason that when the record is properly corrected to show all of the facts pertaining to this case it will be found there is no legal controversy between these parties in the case now before the Court calling for a decision upon the matters argued in the briefs now before the Court.

The reason of this intervention not having been made before is more fully explained in a brief and affidavits and an exhibit submitted in support of this motion.

Dated at Bismarck, North Dakota, September 27th, A. D. 1893.

E. C. D. SHORTRIDGE,
Gov. of N. Dakota.
W. H. STANDISH,
Att'y-General of North Dakota
and Att'y for Intervener.

SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1893.

NORMAN BRASS, Plaintiff in Error,
v.
THE STATE OF NORTH DAKOTA ex rel. LOUIS W. STOESER, Defendant in Error. } *Term No.* 768.

Affidavit of W. H. Standish as to Diligence.

UNITED STATES OF AMERICA,
STATE OF NORTH DAKOTA,
County of Burleigh, } *ss:*

William H. Standish, being first duly sworn, deposes and says that he is the identical person of that name who

is now the attorney-general of the State of North Dakota; that he became such attorney-general on the 3d day of January, A. D. 1893, and not before that time, and that he did not know that the above-entitled case had been submitted on final argument until he received a letter to that effect from the clerk of the above Court, although on or about the 20th day of March, 1893, he was led to suspect something of this kind by information he obtained when visiting the Minnesota legislature, which caused him to write to said clerk to learn if such a case was pending and what situation it was in.

Affiant states that this application is not for the delay of the case, and for no other object than to acquaint the Court with such facts as in affiant's opinion should be before it, and to suggest his views of the law with a view of aiding and lessening the labor of the Court.

This application was prepared in April, but too late to get before above Court before its adjournment.

W. H. STANDISH.

Sworn to before me and subscribed in my presence this 26th day of September, A. D. 1893.

[SEAL.] FRANK V. BARNES,
Notary Public, North Dakota.

EXHIBIT A.—W. H. STANDISH, Atty.

This agreement, made and entered into this — day of ——, 18—, by and between The St. Paul, Minneapolis & Manitoba Railway Company, party of the first part, and ——, part of the second part, witnesseth, that the said party of the first part, for and in consideration of the rents and covenants hereinafter mentioned, to be paid, kept, and performed by the said part of the second part, the said party of the first part has demised, leased,

and let, and by these presents does demise, lease, and let unto the said part of the second part, the following described premises situated in the town of ——, county of ——, —— of ——, bounded and described as follows, viz:

saving and reserving to the party of the first part, its successors and assigns, the right to construct and operate a track or tracks over any part of said above described tract not actually covered by the elevator or grain warehouses hereinafter referred to.

To have and to hold the above rented premises, to the said part of the second part, —— heirs, executors, administrators, and assigns, for and during the full term of —— years, from and after the —— day of ——, A. D. 18—, to be used for the exclusive purpose of erecting thereon a grain warehouse or elevator for the storing and handling of grain.

And the said part of the second part, for —— heirs, executors, administrators, and assigns, agree to and with the said party of the first part, to pay said party of the first party, its successors or assigns, as rent for the above mentioned premises, the sum of —— dollars per annum, payable on the —— day of —— in each year for and during the term of this lease.

First. Said part of the second part further covenant and agree with the party of the first part, its successors and assigns, to construct and complete to the satisfaction of said party of the first part in all respects ready for operation upon said demised premises, on or before the —— day of ——, A. D. 18—, a grain warehouse and elevator of the capacity at one time of not less than —— thousand —— bushels, with all the necessary fixtures, machinery, appliances, and appurtenances for the safe and

prompt receipt, elevation, and delivery on board cars, of grain, and maintain and operate the same during the existence of this lease for public use, without discrimination, and so as at all times to furnish all requisite facilities for the receiving, elevating, cleaning, and shipment of grain at said warehouse and elevator in a prompt and efficient manner, at fair and reasonable rates, and to the reasonable satisfaction of said party of the first part, and so as to give no just ground of complaint to any one doing or requiring to do business thereat.

That the part of the second part shall and will enlarge said warehouse and elevator and its appliances from time to time when required by the said party of the first part so as to provide for the receiving, handling, cleaning, storing, elevating, and delivery of all grain that may be offered thereat.

And said part of the second part hereby further covenant that —— will comply with all provisions of the laws of —— applicable to the management and operation of elevators and grain warehouses therein, and it is further agreed by and between the parties as follows: That should the said part of the second part, —— heirs, executors, administrators, or assigns, fail to make the above-mentioned payment as herein specified and fail to fulfil any of the covenants or provisions of this lease in regard to the management and operation of said elevator or grain warehouse or otherwise, then and in that case it shall be lawful for the said party of the first part, its successors or assigns, upon thirty (30) days notice of its intention so to do, to declare this lease at an end, and to re-enter and take full and absolute possession of the above-rented premises, and hold and enjoy the same fully and absolutely, without such re-entering working a forfeiture of the rents to be paid and the covenants to be performed by the said part of the

second part, —— heirs, executors, administrators, or assigns, for the full term of this lease.

Second. It is further understood and agreed that no other railroad or transportation company, or any person or persons engaged in transportation, shall have the right or be allowed to use any track upon, or extending to said demised premises, without the express permission in writing of the said party of the first part, and said party of the first part shall have the exclusive right of transporting all grain to be transported by rail to or from said warehouse or elevator.

Third. The said part of the second part shall and do hereby assume all risks of loss, damage, or destruction to the said warehouse or elevator, its fixtures, machinery, appliances, or appurtenances and the contents of said warehouse or elevator occasioned by fire or sparks from locomotive engines or other causes, or by the neglect, carelessness, or misconduct of any person in the employment or service of said party of the first part. It being the intent hereof that the said part of the second part shall and do release, forever discharge, save and hold harmless the said party of the first part from all damages and claims for loss or injury suffered or sustained, or that may be suffered or sustained to said warehouse or elevator, fixtures, machinery, appliances, or appurtenances, to grain or any other property contained at any time in said warehouse or elevator or upon said premises.

Fourth. The said party of the first part agrees to renew this lease at the expiration thereof for the further term of —— years, provided that the said part of the second part shall have in all things fully complied with and carried out all the foregoing covenants and provisions, and shall have transacted the business of such warehouse and elevator in a satisfactory manner to the party of the first part and

with a due regard to law and the interest of the public, and provided that said part of the second part shall have given the party of the first part thirty (30) days notice in writing desiring such extension, immediately preceding the termination of this lease.

Fifth. That the said party of the first part shall at all times by such agent or agents as it may order, have free access to said warehouse or elevator for the purpose of inspecting the receiving, weighing, elevating, and delivery of grain thereat, and also to the books, papers, and vouchers of the said part of the second part connected with the said business, and shall have the right to send competent persons to test the scales, the expense of such tests to be paid by the part of the second part.

Sixth. The said part of the second part also covenant and agree to and with the said party of the first part that —— will not assign this lease, nor sublet the above-rented premises, or any part thereof, during the full term of this lease without first obtaining the written consent of the president of said party of the first part, its successors or assigns thereto, and that —— will at the expiration of said time as herein provided quietly yield and surrender the aforesaid rented premises to the party of the first part, its successors or assigns, and remove therefrom all buildings or other erections placed thereon, if required to do so by said party of the first part.

It is mutually understood and agreed that all the covenants and stipulations of this lease are to apply to the heirs, executors, administrators, assigns, and successors of the respective parties hereto.

In witness whereof, the said parties hereto have hereunto set their hands the day and year first above written.

THE ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY,

By ——— ———
President.

——— ———

Signed and delivered in presence of—

——— ———

——— ———

[Endorsed:] Lease. The St. Paul, Minneapolis & Manitoba Railway Company to ———. Not transferable. For ——— at ———. From ——— 18—. R'y Lease Record, page ———.

———

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

NORMAN BRASS, Plaintiff in Error,
v.
THE STATE OF NORTH DAKOTA, ex rel. LOUIS W. STOESER. } *Term No.* 768.

In Error to the Second Judicial District Court of Ramsey County, State of North Dakota.

Affidavit to Sustain Motion of State of North Dakota to Intervene.

STATE OF NORTH DAKOTA, } ss:
County of Burleigh. }

William H. Standish, being first duly sworn, makes oath and says that he is and has been the duly elected and legally qualified attorney-general of the State of North Dakota since the 3d day of January, 1893.

That during March, 1893, he called upon M. D. Grover, the general solicitor of the Great Northern Railway Company, at his office in St. Paul, Minnesota, which railway company was formally known as the St. Paul, Minneapolis, and Manitoba Railway Company.

That this railway extends through several States, and has more mileage of road in North Dakota than any other company. One of the objects of affiant's call on Mr. Grover was to ascertain on what terms the farmers of North Dakota could join together and build elevators on the railroad right of way in the State of North Dakota of the aforesaid railway company without obtaining further legislation.

Thereupon he was shown this blank lease form that is hereto attached and marked Exhibit A and made a part of this affidavit, and was told by said attorney of said railway that it was the form of contract which the company had made and used with every one in the State of North Dakota since their railroad was established in said State.

Affiant states that he knows the location of the elevator described in the record of the above-entitled suit now pending in the United States Supreme Court, and he says the said elevator is located on the railroad right of way of the Great Northern Railway Company set out and named in the annexed form of contract.

That affiant has lived in the State of North Dakota for ten years last past, and all of that time on the line of said Great Northern Railway, and for nine years less than forty miles east of where the elevator involved in this suit is located; and that during a portion of those nine years affiant was owner of an elevator on said railway's right of way and he is familiar with the practice prevailing in North Dakota by elevators in receiving grain for ship-

ment for the past eight years, and is satisfied from his personal knowledge that all elevator leases ever made by said railway have required the things set out in this blank form of contract, and that on the conditions set out in said form all the elevators in North Dakota have been performing common carrier obligations as set out in said form for the railways they were located on for ten years last past.

Affiant further states that he has been engaged in the practice of law and living in the counties of Ramsey and Nelson, in the State of North Dakota, for ten years last past until the 28th day of December last, and during that time has frequently examined the records of deeds and other papers covering all records recorded in the register of deed's office in said two counties of Nelson and Ramsey, in the State of North Dakota, and he has never found therein any record of any lease contract between the Great Northern Railway or its said predecessor, which railway runs through both of said counties, and any elevator therein, and that in said counties on said line of railway there are thirteen elevators on said line of railway in said Ramsey county and nine in said Nelson county, nearly all of them having been constructed for the last eight years or more, and, as affiant has been informed and believes, with the exception of one, which was built by affiant and others, they have been built under lease contracts by the railway, but they are not recorded anywhere in North Dakota, and affiant knows of no way or means of producing the original lease contract which he believes was made between plaintiff in error herein with the aforesaid railway company, formerly incorporated and known as the St. Paul, Minneapolis and Manitoba Railway Company, until he can become a party to this suit and put the officers of said railway company under oath and compel

them to testify, and to serve notice upon counsel for plaintiff in order to produce the original contract to this Court for its inspection at the hearing of the motion to be made herein for the State of North Dakota to intervene with a brief and to correct the record.

W. H. STANDISH.

Sworn to before me and subscribed in my presence this 26th day of September, A. D. 1893.

[SEAL.] FRANK V. BARNES,
Notary Public, North Dakota.

Office Supreme Court U. S.
FILED.
DEC 14 1892
JAMES H. McKENNEY,
CLERK.

153-391

SUPREME COURT

—OF THE—

UNITED STATES.

OCTOBER TERM, 1892.

Case No. 15,073. Term No. 1103.

NORMAN BRASS,
Plaintiff in Error,

vs.

THE STATE OF NORTH DAKOTA,
EX REL. LOUIS W. STOESER,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

J. F. McGEE,
Attorney for Plaintiff in Error.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1892.

NORMAN BRASS,

Plaintiff in Error,

vs.

STATE OF NORTH DAKOTA,
EX. REL. LOUIS W. STOESER,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The plaintiff in error owns and operates a small grain elevator in the village of Grand Harbor, North Dakota.

The defendant in error, Stoeser, owns a farm adjoining the village, on which in the year 1891 he raised about four thousand bushels of wheat.

On the 30th day of September, 1891, the defendant in error, Stoeser, applied to the plaintiff in error

to store a part of his wheat crop for the compensation fixed by section eleven of chapter 126 of the laws of North Dakota for the year 1891, which plaintiff in error refused to do unless paid therefor at a rate in excess of the statutory rate.

On the same day the defendant in error presented a petition for an alternative writ of mandamus to the District Court of Ramsey county, North Dakota, and on the bare allegation that he had not "sufficient storage capacity on his farm or elsewhere" for his grain, obtained from that court an alternative writ commanding the plaintiff in error to store his grain at the statutory rate of compensation.

On October 5th, 1891, the return day of the alternative writ, the plaintiff in error interposed a return thereto, which sets out in detail the conditions surrounding the grain business in North Dakota and his reasons for refusing to store the grain.

The defendant in error interposed a general demurrer to the return, which was sustained, and the plaintiff in error electing in open court to stand on his return an order was entered awarding a peremptory writ of mandamus.

The plaintiff in error at once perfected an appeal to the Supreme Court of North Dakota, which court affirmed the order and judgment of the District Court and remitted the record to that court.

On the 28th day of May, 1892, final judgment was entered in the District Court, making the judgment of the Supreme Court the judgment of the District Court, and awarding a peremptory writ of mandamus to execute that judgment.

On the 7th day of June, 1892, the plaintiff in error applied to the Honorable David J. Brewer, one of the

associate justices of this court, for a writ of error, which application was granted, and pursuant thereto the record has been transmitted to this court.

Three questions are presented by the record for the consideration of this court:

I.

Can the State of North Dakota, without violating section one of the fourteenth amendment, fix the price to be charged by the plaintiff in error for storing grain in his elevator.

II.

Can the State of North Dakota, without violating section one of the fourteenth amendment, compel the plaintiff in error to insure the grain of third persons, when he is not engaged in the business of insuring property.

III.

Can the State of North Dakota, without violating section one of the fourteenth amendment, compel the plaintiff in error to abandon the business of buying grain and engage in the business of storing grain for third persons.

SPECIFICATIONS OF ERROR.

I.

The court erred in holding section 4, chapter 126, laws of 1891, constitutional, thereby subjecting the warehouse and business of plaintiff in error to the provisions of said chapter.

II.

The court erred in holding that section 4 of chapter 126, laws of 1891, is not in conflict with the provisions of section 1 of the fourteenth amendment to the constitution of the United States.

III.

The court erred in holding that section eleven, chapter 126, laws of 1891, is not in conflict with the provisions of section 1 of the fourteenth amendment to the constitution of the United States.

IV.

The court erred in holding that it is within the constitutional power of the Legislature of North Dakota to regulate the price to be charged for the storage of grain in the warehouse of plaintiff in error.

V.

The court erred in not holding section eleven, chapter 126, laws of 1891, to be in conflict with the provisions of section 1 of the fourteenth amendment to the constitution of the United States, in so far as that section requires the plaintiff in error to engage in the business of insuring property.

VI.

The court erred in not holding chapter 126, laws of 1891, to be in conflict with the provisions of the first section of the fourteenth amendment to the constitution of the United States, in so far as the statute as construed by the court, requires the plaintiff in error to store all grain that may be tendered to him for storage, in this, that the elevator was constructed and has always been maintained for the purpose of buying grain, and under the statute, as construed by the state courts, the plaintiff in error is compelled to rent the storage capacity of his elevator to third parties, and is thereby prevented from conducting his business as a grain-buyer for want of storage capacity.

This is admitted by the demurrer to the return.

Record page 5, lines 34 to 39.

Record page 6, lines 21 to 35.

BRIEF OF THE ARGUMENT.

In the Munn case this court applied an old principle of law to a new state of facts.

It was the application of this principle to the facts of that case, and not the existence of the principle itself, that has subjected the Munn case to "a torrent of adverse professional criticism."

An examination of the writings of Lord Hale and of the English cases shows very clearly that prior to the Munn case the principle had only been applied to cases where the business was carried on under some special privilege or franchise from the Crown, and which the Crown alone could grant.

The Crown having granted the privilege or franchise, could regulate its use.

The application of that principle for the first time to a business conducted by private individuals, on private lands, with private capital, with no privilege or franchise of any kind from the state, and that business, such as had been regarded for centuries as purely private, naturally created intense feeling and provoked bitter criticism.

The uncertainty that existed as to the possible extensions of the principle to other lines of business and other circumstances, necessarily affected property values.

This uncertainty has in a large measure been removed by unequivocal statements of this court in later cases, limiting and restricting the application of the principle to business in which there is in fact what in England there was in law—a monopoly—at some great trade center.

All American writers on constitutional law who have written since the Munn case was decided, are agreed on this limitation upon the operation of the principle.

In the Sinking Fund Cases, 99 U. S. 700, 747, Mr. Justice Bradley, who concurred in the opinion of the majority of the court in the Munn case, states this limitation very clearly in these words: "Nor does the case in hand bear any analogy to what are familiarly known as the *Granger Cases* reported in 94 U. S. under the name of Munn vs. Illinois, etc.

The inquiry there was as to the extent of the police power in cases where the public interest is affected; and we held that when an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a *practical monopoly* to which the citizen is *compelled to resort*, and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power.

It is obvious that the present case does not belong to that category. * * * * *

To call the law an exercise of the police power would be a misuse of terms."

In Wabash, etc., Ry. Co. vs. Illinois, 118 U. S. 557-569, Mr. Justice Miller, who also concurred in the majority opinion in the Munn case, said in stating what was decided in the latter case: "And in that case the court was presented with the question, which it decided, whether any one engaged in a public business in which all the public had a right to require his service, could be regulated by acts of the legislature in the exercise of this public function and public duty,

so far as to limit the amount of charges that should be made for such services."

In Spring Valley Water Works vs. Schottler, 110 U. S. 347, 354, Chief Justice Waite, who wrote the majority opinion in the Munn case, said: "That it is within the power of the government to regulate the prices at which water shall be sold by one who enjoys a VIRTUAL MONOPOLY of the sale, we do not doubt. That question is settled by what was decided on full consideration in Munn vs. Illinois."

The New York Court of Appeals, while accepting the Munn case as sound law, said: "These cases may perhaps be deemed to have carried the right of legislative interference with private rights and property to its utmost limit."

Bertholf vs. O'Reilly, 74 N. Y. 515-523.

The same court in the Budd case, 117 N. Y. 1, while applying the principle of the Munn case, to a state of facts, identical with those to which it was applied in the Munn case, said: "WE HAVE NO HESITATION IN DECLARING that unless there are special conditions and circumstances which bring the business of elevating grain within principles which, by the common laws and the practice of free governments, justify legislative control and regulation IN THE PARTICULAR CASE, the statute of 1888 cannot be sustained."

This court in its opinion in the Budd case, after quoting the above and other statements from the opinion of the New York Court of Appeals, said: "We regard these views which we have referred to as announced by the Court of Appeals of New York, so far as they support the validity of the statute in question, as sound and just."

In Tiedeman's Lim. of Police Power, sec. 92, it is said. "It is unquestionable that the State can and indeed it is its duty to, subject to police control a monopoly created by law; but in this case (Munn case) it is laid down for the first time that where the circumstances surrounding a particular business, or its character, make it a 'virtual monopoly,' the State can regulate the conduct of the business, so that all having concern in it, will be treated impartially and fairly.

I say this rule has been laid down for the first time, although the chief justice refers to it as a long established rule, and refers to Lord Hale as his authority.

A careful study of Hale's writings will disclose the fact that to no case does he refer in which the business does not under the law constitute a privilege, more or less of a legal monopoly.

There is nothing in his writings to justify the application of his rule or his reasoning to a business, which is a virtual monopoly, but is not made so by law."

The same author at section 93 of the same work says: "But some of the courts are inclined to extend the exercise of this power of control to other cases, which do not come within the classes mentioned, viz: those in which no special privilege or franchise is enjoyed, and in which there is no legal monopoly, but in which the *circumstances conspire to create in favor of a few persons a virtual monopoly* out of a business of supreme necessity to the public. The application of these principles to the case in question only constitutes a precedent for justifying the regulation of prices in those cases, where the business is a virtual monopoly and of great necessity to the public."

The leading case is that of Munn vs. Illinois.

Judge Cooley, in his work on Const. Lim. (6th Ed.) 734-40, in reviewing the Munn case, said: "What circumstances shall affect property with a public interest is not very clear.

The mere fact that the public have an interest in the existence of the business, and are accommodated by it, cannot be sufficient, for that would subject the stock of the merchant, and his charges to public regulation.

The public have an interest in every business in which an individual offers his wares, his merchandise, his services, or his accommodations to the public; but his offer does not place him at the mercy of the public in respect to charges and prices.

If one is permitted to take upon himself a public employment, with special privileges which only the State can confer upon him the case is clear enough.

And it seems to have been the view of both courts in this case (Munn case) that the circumstances were such as to give the warehousemen in Chicago, who were the only persons affected by the legislation, a "virtual" monopoly of the business of receiving and forwarding the grain of the country to and from that important point, and by the very fact of monopoly to give their business a public character, affect the property in it with a public interest and render regulation of charges indispensable."

The same author, in his Principles of Constitutional Law, 234, after arranging under four heads the cases in which in his judgment "property in business" is affected with a public interest, adds: "To these may be added those employments which are quasi public, and essential to the business of the country, *but which the circumstances give to a few persons a*

virtual monopoly at each important commercial center, such as those who own elevators for the storage of grain have in Chicago."

In Beach on Private Corporations, section 30, the limitation on the principle of the Munn case is thus stated: "Whenever any person pursues a public calling and sustains such relations to the public that the people must of NECESSITY deal with him, and are under a MORAL DURESS to submit to his terms if he is unrestrained by law, then in order to prevent extortion and an abuse of his position, the price he may charge for his services may be regulated by law."

In the Munn and Budd cases this court was careful to limit the operation of the principle enunciated and applied to those particular cases.

In the Munn case, after detailing the peculiar and extraordinary circumstances surrounding the business of elevating grain at Chicago, this court said: "*Under such circumstances* it is difficult to see why, if the common carrier * * * * pursues a public employment and exercises 'a sort of public office,' these plaintiffs in error do not * * * * * * *

Certainly if any business can be clothed 'with a public interest, and cease to be juris privati' only, this has been.

It may not be made so by operation of the constitution of Illinois or this statute, BUT IT IS BY THE FACTS."

In the Budd case it was said by this court: "ON THE TESTIMONY IN THE CASES BEFORE US, the business of elevating grain is a business charged with a public interest, and those who carry it on occupy a relation to the community analogous to that of common carriers."

This court in the Budd case, speaking of what was decided by the New York Court of Appeals in the same case, said: "The Court of Appeals said that, in view of the foregoing exceptional circumstances, the business of elevating grain was effected with a public interest."

The record in this case presents the question whether the Munn case as a precedent is applicable to the facts of this case.

This court, in Cohen vs. Virginia, 6 Wheat, 399, said: "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used."

In Wells on Stare Decisis, section 584, it is said: "A second fundamental law is, that language used in an opinion, whether in the reasoning or in the conclusion established thereby, is always to be explained by the case under consideration, and to that extent only is a decision fitted to serve as a precedent."

In People vs. Walker, 9 Cal. 236, it is said: "It is true that the language of that opinion, taken without reference to the circumstances of the case, would bear the construction contended for, but the rule is well settled that the language of an opinion in general must be held as referring to the particular case decided."

From what has been said it is clear that the operation of the principle of the Munn case has been, by the decisions of this court, confined within well defined limits, and if that principle is to be applied to the case at bar the ground upon which its application to the Munn and Budd cases was justified must be abandoned and a new foundation must be constructed

to support it in the future.

It would seem to be too clear, to admit of controversy, that if the principle was applied to the Munn and Budd cases because of the extraordinary, peculiar and exceptional facts and circumstances that surrounded the business of elevating grain at Chicago and Buffalo, constituting, as was held by this court, a "practical" or "virtual" monopoly, a substantially similar situation must be found in North Dakota to make the principle applicable to this case.

If the situation in North Dakota is not exceptional, peculiar and extraordinary, if there is not the faintest semblance of a monopoly of any kind in the grain business in North Dakota, in other words if the situation in North Dakota is exactly the reverse of the situation at Chicago and Buffalo, when the Munn and Budd cases arose, the judgment in this case must be reversed, or all the limitations and restrictions placed around the operation of this principle must be torn away and unrestricted scope must be accorded to it, so that the dry goods and grocery stores may be regulated in the matter of charges and in all other respects.

There is not a single reason that can be given why the wheat merchants in the various towns, villages and way stations of North Dakota should be subject to legislative regulation that does not apply with equal or greater force to the dry goods and grocery merchants in the same localities.

If we are mistaken as to the limits within which the principle of the Munn case is operative, in other words if there are no limitations upon the operation of that principle, then anything that may be said on behalf of the plaintiff in error will be ineffectual.

On the other hand, if we are correct in our views as to the limits within which the operation of that principle is confined and are able to demonstrate on this record that this case is beyond those limits, it would seem that a judgment of reversal is inevitable.

The remaining pages of this brief will be devoted mainly to demonstrating that the facts in the case at bar take the case without the limits mentioned in the last paragraph.

I.

The statutes of Illinois and New York never attempted to regulate in any manner elevators located throughout the farming districts of the state, but were so limited that in the one case the legislation was inoperative outside of Chicago, while in the other case it was inoperative outside the cities of New York, Brooklyn and Buffalo; in other words, the statutes were only designed to operate in great trade centers, where, on account of the business being localized in the hands of a very few people in close proximity to each other, great opportunities for the formation of combinations to raise elevating and storage charges and to practice extortion were afforded.

In the case at bar the facts are reversed.

The statute of North Dakota is made to operate in every country town, village and way station in the state.

The business which the statute in question seeks to control is not located in a single city, in the hands of less than a dozen people, as it is in Chicago, Buffalo and New York, where great opportunities for combinations are afforded; on the contrary it is admitted on the record in this case that these little flat-houses,

elevators and warehouses number over six hundred, are owned and operated by over 125 different owners, independently of and in competition with each other, and are scattered over 74,312 square miles of territory.

Record page 5.

The city of Chicago, when the Munn statute was enacted, contained three times the population that the entire state of North Dakota contains today, and the same is true in regard to Buffalo in 1888 when the Budd statute was enacted.

"Standing in the very gateway of commerce," through the portals of which the surplus grain product of a continent was forced to pass on its way to Eastern and foreign markets, fourteen elevators, and those practically touching each other, controlled by nine firms and situated in the city of Chicago, were enabled to levy a tribute upon the nation, and the situation as i then existed has been aptly described as follows: "These firms 'sat at the receipt of customs' on the great grain highway of a continent.

"The commerce of seven states was subject to their tolls, and they might at their option join in raising or lowering the price of the food supply of half the world."

It will be admitted that a small number of elevators, owned by a still smaller number of men, situated in a single city, practically touching each other, with interests identical and the volume of business enormous, presents a situation favorable to the formation of combinations, but let us change the situation by enlarging the number of elevators from fourteen to six hundred and the number of owners from nine to one hundred and twenty-five, and let us change the

location so that instead of being located in a single city, and that city the greatest grain market in the world, these six hundred elevators are scattered over 74,312 square miles of territory in a purely agricultural state, situated on different and competing lines of railroad with interests antagonistic to each other, and we have a situation that renders combinations impossible.

II.

Another difference of vital importance to which the attention of the Court is directed is, that the business which the Illinois and New York statutes were designed to control and the manner in which that business is conducted in the cities of Chicago, Buffalo, Brooklyn and New York is unknown in North Dakota.

Between the wheat fields of the West and Northwest and the seaboard the wheat is transported by means of railroads, lake vessels and the great terminal elevators of Duluth, Chicago, Buffalo, New York and Brooklyn, and without the aid of these great terminal elevators in elevating the wheat from the cars in which it comes from the wheat field into the cars and lake vessels that carry it to the seaboard it is practically impossible to transport the wheat; in other words these great terminal elevators form the most essential link in the lines of transportation between the wheat fields and the seaboard.

Sink the lake vessels and these great terminal elevators in connection with the railroads can transport the wheat to the seaboard.

Destroy the railroads and these great terminal elevators and the lake vessels can deliver the wheat at the seaboard.

Destroy the great terminal elevators and the railroads and lake vessels are powerless to transport the wheat crop.

It was those great terminal elevators that the statutes of Illinois and New York were designed to control, and the principle use of those elevators is as the name implies, to ELEVATE grain, that is to transfer it from car to vessel and from vessel to car, and it was because of the fact that they form the most essential link in the lines of transportation from the west to the seaboard, and occupying that position could, if not regulated by law, control the wheat markets of the world, that the right to regulate them by law was sustained.

Situated in that position where, as has been said, a few persons "might at their option join in raising or lowering the price of the food supply of half the world," it was held by this court that the business fell within the reason of the rule deduced from the writings of Lord Hale.

It was with reference to that situation that Mr. Justice Bradley in the Sinking Fund cases, 99 U. S., 700, 747, said: "And we held that when an employment becomes a matter of such public interest as to create a common charge or burden upon the citizen, in other words when it becomes a PRACTICAL MONOPOLY to which the citizen is COMPELLED to resort, and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power."

In North Datoka the situation is exactly reversed.

The street buyer and track shipper, who does not invest a dollar in a warehouse of any kind, buys the wheat in competition with the elevator owner on the

streets from the farmers as they come to the station and loads it into the cars from the farmer's wagons, on loading platforms.

Farmers' Shipping Associations own their own warehouses and elevators, but store and ship only the grain of their own members.

Other buyers of grain have small, inexpensive flathouses and warehouses, into which grain is shoveled from wagons or emptied from sacks onto the floor and from the floor is shoveled into the cars.

In these buildings there are no means of elevating grain.

There are other grain houses called elevators, and differing from the former only in having a hopper into which the grain is emptied, and from which by means of tin buckets attached to endless belts, operated by horse or steam power, the grain is elevated into bins, and when ready for shipment is dropped from the bins through spouts into the cars.

There is also the mill owner, who operates his grain warehouse or elevator as a means of supplying his mill with wheat.

To the above add the farmers who, as the record admits, in 1890 shipped nearly fifty per cent of the entire grain yield of the state without the aid or intervention of elevators of any kind and we have a situation diametrically the opposite of that presented by the Munn and Budd cases.

Record page 7.

It is these little inexpensive flathouses, warehouses and elevators that a Farmers' Alliance Legislature has attempted to take from the control of their owners, and to which it is sought to apply the principle which in the Munn and Budd cases has been applied to the

great terminal elevators at the great trade centers of the nation.

The owners of the great terminal elevators mentioned are not buyers of grain. Their business is confined to elevating and storing grain for third persons when it is in course of transportation.

The elevators, warehouses and flathouses in North Dakota are operated for the sole purpose of buying grain, and on the record in this case it is admitted that the storing of grain for third persons is but a mere incident to the business of buying grain, and is only done at seasons of the year when the elevator owner has storage capacity in excess of the needs of his own business.

Record pages 5 and 6.

The nature of the business of the plaintiff in error is fully disclosed by the return to the alternative writ, and the allegations of that return are admitted by the demurrer to be true.

Record pages 5 to 9. Record page 27.

The Supreme Court of the state in its opinion said: "The appellant's grain elevator may be taken as fairly representative of the six hundred grain elevators, flathouses and warehouses which it appears by the answer exist in North Dakota."

Record page 58.

This may be taken as true.

With this admission the record admits that the elevators, flathouses and warehouses in North Dakota were constructed and are operated for the same purpose as the elevator of plaintiff in error.

The return alleges and the demurrer admits: "That respondent's principal business is that of buy-

"ing wheat at Grand Harbor, North Dakota, and "shipping the same to and selling it at Minneapolis "and Duluth, Minnesota, to which the business of "storing grain for third persons is and always has "been a mere incident.

"That all grain purchased by respondent at his "said elevator is purchased for the sole purpose of "being shipped to and sold at, and is shipped to and "sold at, Minneapolis and Duluth, Minnesota.

"That respondent in the conduct of his said busi- "ness contracts with millers and other purchasers of "grain at said Minneapolis and Duluth to sell and "deliver to said persons at a future and fixed date "certain quantities of wheat, and operates and main- "tains his said elevator for the exclusive purpose of "purchasing grain to fill said contracts.

"That in seasons when the grain yield is light and "railroad facilities are such as to enable grain to be "moved rapidly there is space and storage capacity "in respondent's elevator in excess of that used by "respondent's grain, and particularly when respon- "dent's contracts for the sale of grain are small, while "at other times when the yield is enormous, as in "the present year, respondent's contracts large and "the quantities of grain presented for shipment are "beyond the capacity of the railroads to move, there "is not sufficient storage capacity in respondent's "elevator to hold and store the grain purchased by "respondent in the conduct of his said business.

"That there are located in Minneapolis and Duluth, "Minnesota, a great number of corporations, persons "and co-partnerships engaged in a business known as "the grain commission business.

"That these grain commission houses have swarms

"of agents traveling throughout the state of North "Dakota, going from town to town and farm to farm "purchasing grain from farmers in some instances "and in others soliciting farmers to ship their grain "to said houses at Minneapolis or Duluth, Minnesota, "to be sold by the latter on commission.

"That none of said grain commission houses have "or own any storage capacity in North Dakota.

"That if chaper 126 of the laws of 1891 is valid "and its effect is to compel respondent to receive all "grain that may be tendered to him for storage by "grain commission men, farmers, grain speculators "and others, without reference to the necessities or "condition of respondent's business, at any particular "time, the entire storage capacity of respondent's "elevator will be exhausted in storing grain for third "persons, and the principal business of respondent, "to conduct which his capital was invested in said "elevator, will be utterly ruined and annihilated for "want of storage capacity to contain wheat purchased "by him to fill contracts made by him in the conduct "of his said business, and respondent subjected to "suits for damages for non-fulfillment of his said con- "tracts."

Record pages 5 and 6.

In the face of these undisputed facts, the North Dakota Supreme Court cannot understand how the plaintiff in error is being deprived of his property without due process of law or is being denied the equal protection of the laws so long as he receives two cents per bushel for storing wheat for twenty days and the statutory rate thereafter.

The admitted fact that the elevator was not built and is not being operated for the purpose of storing

grain for third persons; the fact that the elevator capacity of plaintiff in error is barely sufficient for his own business of buying grain; and the admitted fact that if plaintiff in error is compelled to do what that court has decided in this case he must do, "the entire "storage capacity of respondent's elevator will be "exhausted in storing grain for third persons and the "principal business of respondent, to conduct which "his capital was invested in said elevator, will be "utterly ruined and annihilated," does not in the mind of the court deprive him of his liberty or property without due process of law so long as he receives the statutory rate for storing the grain.

Record page 6.

The answer is that the plaintiff in error did not invest his capital in that elevator for the purpose of storing grain for third persons, but did make the investment for the purpose of engaging in the business of buying grain and this is admitted by the demurrer, and it matters not whether the defendant in error offered to pay plaintiff in error two cents or two dollars per bushel for storing grain, for the reason that the legislature has no power whatever to compel the plaintiff in error to abandon the business of buying grain and devote his property to the business of storing grain—the same principle that would justify the exercise of such power would sustain a law compelling the plaintiff in error to abandon the business of buying grain and requiring him to convert his building into a dram shop.

The fact that the Munn and Budd elevators were engaged in the business of elevating and storing grain exclusively, while the elevator of plaintiff in error is devoted to the purpose of buying grain, consti-

tutes another vital distinction between those cases.

In the former cases the business to which the property was devoted was regulated, while in the case at bar the legislation seeks to change the essential nature of the business.

MUNN CASE.

III.

The surplus grain product of seven of the great grain producing states of the West was forced to pass through fourteen elevators located in one city and controlled by nine firms.

"Thus it is apparent that all the elevating facili-
"ties through which these vast productions of seven
"or eight great states of the West must pass on the
"way to four or five of the states on the seashore
"may be a VIRTUAL MONOPOLY."

Munn vs. Illinois, 94 U. S. 113.

In the case at bar there can be no monopoly, virtual or otherwise, so far as elevating facilities are concerned, in fact the statute is not directed against persons engaged in the business of elevating grain, but is directed against "All buildings, elevators and warehouses * * * erected and operated * * * for the purpose of BUYING, SELLING, STORING, shipping or HANDLING grain for profit."

IV.

The only practicable means of transferring the surplus grain product of seven great grain-producing states from the cars to the boats are fourteen elevators controlled by nine firms.

No conditions similar to the above exist in North Dakota.

V.

"The grain warehouses or elevators in Chicago are immense structures holding from three hundred thousand to one million bushels at one time according to size."

Munn vs. Illinois, 94 U. S. 113.

In North Dakota the reverse of this is true, and it is admitted of record that the structures vary in cost of construction from five hundred to five thousand dollars, and vary in capacity from five to fifty thousand bushels.

Record page 5.

VI.

The warehouses and elevators of Chicago "are "located with the river harbor on one side and the "railway tracks on the other, and the grain is run "through them from car to vessel, or boat to car, as "may be demanded in the course of business."

Munn vs. Illinois, 94 U. S. 113.

From the nature of the case no similar facts exist in North Dakota.

The foregoing are the controlling facts in the Munn case, which we repeat are the reverse of the facts in the case at bar.

BUDD CASE.

VII.

The wheat handled at Chicago on its way to the seaboard passes through the Buffalo elevators and is transshipped into canal boats, and transported through the Erie canal and the Hudson river to the harbor of New York, and there discharged by elevators into warehouses or ocean vessels.

No similar conditions exist in North Dakota.

VIII.

"The business of transporting grain by the lakes "and thence by the Erie canal to New York is of "great magnitude.

"The case shows that about 120,000,000 of bush- "els of grain annually come to Buffalo from the West."

"The business of elevating grain at that point is "mainly connected with lake and canal transporta- "tion."

"It is shown by official records that the receipts of "grain at New York in the year 1887, by way of the "Erie canal and Hudson river, during the season of "canal navigation, exceeded 46,000,000 bushels, an "amount very largely in excess of the amount re- "ceived during the same period by rail and by river "and coastwise vessels."

No similar conditions exist in North Dakota.

IX.

"It is asserted that a combination exists, and has "for several years existed, between the elevator own- "ers to maintain excessive charges by fixing a uni- "form tariff and pooling the earnings."

In the case at bar it is alleged in the return and admitted by the demurrer that the elevators in North Dakota are operated independently of and in competition with each other.

Record page 5

It is also admitted by the demurrer that the rate demanded by the plaintiff in error from the defendant in error is the rate that has been in force in North Dakota for the past 13 years.

Record pages 5 and 6.

It is also admitted that the rate fixed by section eleven of chapter 126 of the laws of 1891 was de-

nounced by the railroad and warehouse commissioners of North Dakota in their annual report to the Governor for 1890, "after thorough investigation," as unreasonably low.

Record page 7.

The board of railroad and warehouse commissioners are by law constituted a tribunal to investigate such matters, and that board in the same report recommended that the rate demanded by the plaintiff in error be established by law as the rate to govern in the storage of grain.

Record page 7.

The political revolution of November, 1890, placed the Farmer's Alliance in possession of the legislative department of the state government and the recommendations mentioned were ignored.

Upon this record it is admitted that no combination of any kind exists between the elevators, warehouses and flathouses in North Dakota.

Record page 5.

X.

"There is no evidence in the record as to the loca-
"tion in the port of Buffalo suitable and available for
"stationary elevators."

"In the city of Buffalo the elevators are located at
"the junction of the canal with Lake Erie."

"The area upon which it is practicable to erect
"them is limited."

The record in this case presents a situation precisely the reverse of the above.

The return alleges and the demurrer admits: "That land upon which it is practicable to erect other elevators at every station in North Dakota, at which grain

is marketed, is unlimited in area and can be readily purchased at prices varying from one dollar and twenty-five cents to forty dollars per acre."

Record page 5.

The elevators, flathouses and warehouses in North Dakota, are not situated as are the Buffalo elevators, on the Erie canal through the narrow channel of which the greater portion of the surplus grain product of a continent must pass on its way to the seaboard, but on the contrary are s cattered over 74,312 square miles of prairies.

XI.

"The extent of the business is shown by the facts "to which we have referred."

"A large proportion of the surplus cereals of the "country passes through the elevators at Buffalo, and "finds its way through the Erie canal and Hudson "river to the seaboard at New York from whence "they are distributed to the markets of the world.

"They are located upon or adjacent to the waters "of the state, and transfer from the lake vessels to "the canal boats, or from the canal boats to the ocean "vessels, the cargoes of grain."

"It is by means of the elevators (at Chicago and "Buffalo) that transportation of grain by water from "the upper lakes to the seaboard is rendered pos- "sible."

A state of facts similar to the above does not exist in North Dakota and from the nature of things never can exist there.

XII.

"The third element of publicity which tends to "distinguish the business of elevating grain from gen- "eral commercial pursuits is the practical monopoly

"which is or may be connected with its prosecution."

"The structures are expensive, and the circum-"stances afford great facility for combination among "the owners of elevators to fix and maintain an ex-"orbitant tariff of charges."

The statute in question is aimed at owners of elevators and warehouses operated "for the purpose of 'buying,' 'selling,' 'storing,' 'shipping,' or 'handling'" grain for profit.

It is admitted on the record in this case that no combination of any kind exists in the grain business in North Dakota, and it is our purpose to demonstrate that the natural conditions existing in North Dakota and the laws in force in that state make the formation of illegal combinations in the grain business impossible there.

———o———

DOES THE PLAINTIFF IN ERROR OR ANY OTHER PERSON OR PERSONS ENJOY A MONOPOLY EITHER "LEGAL," "VIRTUAL," OR "PRACTICAL," OF THE BUSINESS OF "BUYING" GRAIN IN NORTH DAKOTA?

The return alleges and the demurrer admits: "That there are from two to ten elevators, warehouses and flathouses operated and owned, each by different owners, at every station in North Dakota at which grain is marketed."

Record page 5.

The return also alleges and the demurrer admits: "That the elevators, flathouses and warehouses in North Dakota are owned by over one hundred and twenty-five different owners and are operated "independently of and in competition with each other."

Record page 5.

It is also admitted that the numerous "grain commission houses of Minneapolis and Duluth" have "swarms of agents traveling throughout the state of North Dakota, going from town to town and farm to "farm, purchasing grain from farmers in some instances and in others soliciting farmers to ship their "grain to said houses at Minneapolis or Duluth, "Minnesota, to be by the latter sold on commission."

Record page 6.

It is admitted: "That since the enactment of "chapter 126 of the laws of 1885, the amount of grain "shipped directly by farmers without the intervention of elevators, warehouses or flathouses has been "increasing, and in 1890, as respondent is informed "and believes, nearly fifty per cent of the grain product of North Dakota, was shipped to Minneapolis "and Duluth, Minnesota, by farmers, that the amount "of grain shipped in that manner is steadily increasing from year to year."

Record page 7.

If the farmer in North Dakota is not satisfied with the price offered by the grain buyers in his locality, he loads his wheat into cars and in thirty-six hours it is sold on the market in Minneapolis or Duluth, by grain commission houses, the latter receiving one-half of one cent per bushel commission.

If there is a sudden advance on the market the farmer wires his commission house to sell so much wheat of a certain grade "to arrive," and the wheat is thereafter shipped.

The above will suffice to show that no such monopoly exists or ever can exist in North Dakota.

nounced by the railroad and warehouse commissioners of North Dakota in their annual report to the Governor for 1890, "after thorough investigation," as unreasonably low.

Record page 7.

The board of railroad and warehouse commissioners are by law constituted a tribunal to investigate such matters, and that board in the same report recommended that the rate demanded by the plaintiff in error be established by law as the rate to govern in the storage of grain.

Record page 7.

The political revolution of November, 1890, placed the Farmer's Alliance in possession of the legislative department of the state government and the recommendations mentioned were ignored.

Upon this record it is admitted that no combination of any kind exists between the elevators, warehouses and flathouses in North Dakota.

Record page 5.

X.

"There is no evidence in the record as to the loca-
"tion in the port of Buffalo suitable and available for
"stationary elevators."

"In the city of Buffalo the elevators are located at
"the junction of the canal with Lake Erie."

"The area upon which it is practicable to erect
"them is limited."

The record in this case presents a situation precisely the reverse of the above.

The return alleges and the demurrer admits: "That land upon which it is practicable to erect other elevators at every station in North Dakota, at which grain

is marketed, is unlimited in area and can be readily purchased at prices varying from one dollar and twenty-five cents to forty dollars per acre."

Record page 5.

The elevators, flathouses and warehouses in North Dakota, are not situated as are the Buffalo elevators, on the Erie canal through the narrow channel of which the greater portion of the surplus grain product of a continent must pass on its way to the seaboard, but on the contrary are s cattered over 74,312 square miles of prairies.

XI.

"The extent of the business is shown by the facts "to which we have referred."

"A large proportion of the surplus cereals of the "country passes through the elevators at Buffalo, and "finds its way through the Erie canal and Hudson "river to the seaboard at New York from whence "they are distributed to the markets of the world.

"They are located upon or adjacent to the waters "of the state, and transfer from the lake vessels to "the canal boats, or from the canal boats to the ocean "vessels, the cargoes of grain."

"It is by means of the elevators (at Chicago and "Buffalo) that transportation of grain by water from "the upper lakes to the seaboard is rendered pos-"sible."

A state of facts similar to the above does not exist in North Dakota and from the nature of things never can exist there.

XII.

"The third element of publicity which tends to "distinguish the business of elevating grain from gen-"eral commercial pursuits is the practical monopoly

"which is or may be connected with its prosecution."

"The structures are expensive, and the circum-"stances afford great facility for combination among "the owners of elevators to fix and maintain an ex-"orbitant tariff of charges."

The statute in question is aimed at owners of elevators and warehouses operated "for the purpose of 'buying,' 'selling,' 'storing,' 'shipping,' or 'handling'" grain for profit.

It is admitted on the record in this case that no combination of any kind exists in the grain business in North Dakota, and it is our purpose to demonstrate that the natural conditions existing in North Dakota and the laws in force in that state make the formation of illegal combinations in the grain business impossible there.

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DOES THE PLAINTIFF IN ERROR OR ANY OTHER PERSON OR PERSONS ENJOY A MONOPOLY EITHER "LEGAL," "VIRTUAL," OR "PRACTICAL," OF THE BUSINESS OF "BUYING" GRAIN IN NORTH DAKOTA?

The return alleges and the demurrer admits: "That there are from two to ten elevators, warehouses and flathouses operated and owned, each by different owners, at every station in North Dakota at which grain is marketed."

Record page 5.

The return also alleges and the demurrer admits: "That the elevators, flathouses and warehouses in North Dakota are owned by over one hundred and twenty-five different owners and are operated "independently of and in competition with each other."

Record page 5.

It is also admitted that the numerous "grain commission houses of Minneapolis and Duluth" have "swarms of agents traveling throughout the state of North Dakota, going from town to town and farm to "farm, purchasing grain from farmers in some instances and in others soliciting farmers to ship their "grain to said houses at Minneapolis or Duluth, "Minnesota, to be by the latter sold on commission."

Record page 6.

It is admitted: "That since the enactment of "chapter 126 of the laws of 1885, the amount of grain "shipped directly by farmers without the intervention of elevators, warehouses or flathouses has been "increasing, and in 1890, as respondent is informed "and believes, nearly fifty per cent of the grain product of North Dakota, was shipped to Minneapolis "and Duluth, Minnesota, by farmers, that the amount "of grain shipped in that manner is steadily increasing from year to year."

Record page 7.

If the farmer in North Dakota is not satisfied with the price offered by the grain buyers in his locality, he loads his wheat into cars and in thirty-six hours it is sold on the market in Minneapolis or Duluth, by grain commission houses, the latter receiving one-half of one cent per bushel commission.

If there is a sudden advance on the market the farmer wires his commission house to sell so much wheat of a certain grade "to arrive," and the wheat is thereafter shipped.

The above will suffice to show that no such monopoly exists or ever can exist in North Dakota.

DOES ANY MONOPOLY IN THE BUSINESS OF SELLING GRAIN EXIST IN NORTH DAKOTA?

The first answer to this question is that no one will claim that any such monopoly does or can exist in the state.

The only grain sold in North Dakota is sold by the producers, each farmer selling the product of his own farm.

The second answer is that the entire grain product of North Dakota is sold in an open market in a foreign state where neither the North Dakota Farmer's Alliance or legislature have any control.

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IS THERE A MONOPOLY OF ANY KIND OF THE BUSINESS OF STORING GRAIN IN NORTH DAKOTA?

Chapter 126 of the laws of 1891 is practically a copy of the Illinois statute, sustained by this court in the Munn case and to the minds of a Farmers' Alliance legislature, there is no reason why a statute that might be made to operate in the greatest grain market in the world cannot be made equally applicable to the little towns, villages and way stations throughout an agricultural state.

This "statute is a procrustean bed."

"It consigns all sizes and conditions to the same "measure of treatment, regardless of their differences."

State vs. Fire Creek, etc., Co. (W. Va.) 10 S. E. Rept. 288.

The Munn statute was limited in its operation to Chicago and regulated the elevating and storage of grain in that city.

On its way to the seaboard the grain was forced to pass through the great terminal elevators of Chicago and had to be stored in them.

The business of storing grain at Chicago and Buffalo and elevating the same is an independent business and those elevators form an indispensable link in the lines of transportation between the wheat fields of the West and the seaboard.

The very reverse of this state of facts is found in North Dakota.

The elevator business as conducted in North Dakota bears no resemblance to that business as it is conducted in great trade centers like Chicago and Buffalo.

In North Dakota the elevators, warehouses and flathouses are maintained for the purpose of buying grain, which is shipped to and sold at Minneapolis and Duluth to millers and other purchasers of grain, and it is admitted on the record in this case that the business of storing grain is a mere incident to the principal business of buying grain, and that grain of third persons is only stored when there is capacity in the buildings in excess of the needs of the owner of the building.

Record pages 5 and 6.

The statute sustained in the Munn case was sustained because the peculiar situation at Chicago was such as to place the grain shipping interests of the West and Northwest at the mercy of nine firms who controlled the fourteen elevators in Chicago. Those shipping interests were under MORAL DURESS, so that they were FORCED to use those elevators; their use was a matter of compulsion, a matter of necessity, and, to use the language of Mr. Justice Bradley in the Sinking Fund cases, 99 U. S. 718, they had become

"a PRACTICAL MONOPOLY, to which the citizen is COMPELLED to resort and by means of which a tribute can be exacted from the community."

Now the reason why the shipper was FORCED to use those elevators and had no choice in the matter is that the grain had to go through Chicago on its way to Eastern markets and the seaboard and those were the only elevators in Chicago, and the grain could not be transferred from the cars to the boats without using them, while in North Dakota the situation is exactly reversed, and no farmer is under "moral duress" nor is under compulsion or overwhelming necessity or any necessity whatever to use the small flathouses, warehouses and elevators, six hundred in number, scattered over the entire state.

In North Dakota these warehouses adjoin the wheat fields, and the farmer can do precisely as he pleases so far as storing or not storing his grain in any of the various warehouses throughout the state is concerned.

The proper place for a farmer to store his wheat is in his own granary until he gets ready to haul it to market, and it is admitted on the record that: "The average farm in North Dakota does not exceed 160 acres in area; that the average yield of grain of a quarter section of land in North Dakota does not exceed twenty-five hundred bushels; that a granary sufficient in size to safely and securely store twenty-five hundred bushels of grain can be erected on any farm in North Dakota at a cost not exceeding one hundred and fifty dollars."

Record page 7.

The record does not disclose how much granary capacity the defendant in error has on his farm, but he presumably has some, as he alleges in his petition

that he "has not sufficient storage capacity on his farm or elsewhere for said grain," and if he had none the record shows that for $240.00 he could erect a granary sufficient in size to store all of his crop.

The fact that the defendant in error prefers not to invest that sum in a granary of his own ought not to create any right on his part to seize the granary of the plaintiff in error.

If a railroad station is a more convenient place for the storage of grain than a granary situated on a farm then the answer is that any farmer in the state or any other person has a perfect and statutory right to erect a granary adjacent to the right of way of any railroad, without reference to the size or capacity of the granary, and is entitled to have side track connections made.

Land upon which a granary may be erected at any station in the state can be had for a trifling sum.

Section 9 of chapter 126, laws of 1885, provides that: "It shall be the duty of all railroad corporations doing business in this territory, upon reasonable notice, to furnish suitable cars to any and all persons who may apply therefor for the transportation of any and all kinds of freight, and to secure and transport such freight with all reasonable dispatch, and to provide and keep suitable facilities for securing and handling the same at any depot on the line of its road," etc.

Section ten of the same chapter provides that: "Any railroad company doing business in this territory, when desired by any person wishing to ship grain over its road, shall receive and transport such grain in bulk within a reasonable time, and permit the same to be loaded either on its track adjacent

"to its depot or at any warehouse or side track with-
"out distinction, discrimination or favor between one
"shipper and another; and without discrimination or
"distinction as to the manner in which such grain is
"offered for transportation, or as to the person, ware-
"house elevator or place where or to which it may be
"consigned.

"Every railroad company shall permit connections
"to be made and maintained in a reasonable manner
"with its track to and from any warehouse, elevator
"or mill adjacent to any station on its line without
"reference to its size and capacity, where grain may
"be stored.

"Grain shall be received from wagons or sleighs in
"carload lots, the same as when offered from ware-
"houses or elevators, allowing a reasonable time for
"loading the cars, and the cars shall be placed in a
"convenient place, easy of access."

Sections 9 and 10 above quoted are re-enacted as sections 5 and 6 of chapter 110, laws of 1889, and as re-enacted are enlarged in their scope.

Section 7 of chapter 110, laws of 1889, re-enacted as section 7 of chapter 122, laws of 1890, empowers the railroad and warehouse commissioners to make rules for the distribution of cars and the rules as made are set out in the return of the plaintiff in error to the alternative writ and they in their operation create as was evidently intended, by the railroad commissioners, a legal monopoly in favor of farmers and track shippers and against elevator, warehouse and flathouse owners.

Record pages 7 and 8.

On any given day if there are twenty cars at Grand Harbor for instance, available for the shipment of

grain, and seventeen farmers with one carload of grain each and plaintiff in error and the other two warehouse owners at that station, with thirty thousand bushels of grain in each of their buildings, the farmers with four or five hundred bushels of grain each, take seventeen of the twenty cars.

This situation being the product of a statute is correctly designated a "legal monopoly."

Chapter 123, laws of 1890, entitled "An act to facil- "itate the shipments of live stock, grain and other "commodities" provides that: "Every railroad com- "pany or corporation doing business in this state "shall within sixty days after this act shall go into "effect upon notice from the commissioners of rail- "roads, build, erect and complete one or more plat- "forms for the transfer of livestock, grain and other "commodities from wagons or otherwise to cars at "each and every station designated in said notice."

Section 2 provides that: "Each platform shall not "be less than twelve feet wide and thirty-two feet "long, extending two feet eight inches above the "rails of the track, with suitable approaches to and "from said platform to admit the driving of loaded "teams thereon."

Section 3 subjects any railroad company failing to comply with the provisions of the act to a fine of five hundred dollars for every thirty days of non-compliance.

Section 4 provides a penalty of no less than $100.00 nor more than $300.00 to be imposed upon "Every "commissioner of railroads who shall fail to notify "such railroad company after receiving a petition "signed by ten taxpayers of the place or its vicinity "where such platform is to be erected."

To the foregoing add that which is a matter of common knowledge, that wheat loaded at any station in North Dakota on the morning of one day is on the afternoon of the following day in the boats at Duluth or in the mills at Minneapolis, and a situation is shown to exist that renders any monopoly of the business of storing grain in North Dakota a physical impossibility.

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DOES OR CAN A MONOPOLY OF THE BUSINESS OF "HANDLING OR SHIPPING" GRAIN EXIST IN NORTH DAKOTA?

The record furnishes a conclusive answer to this question in admitting that nearly fifty per cent of the entire grain product of the state was in 1890 shipped by farmers without the aid or intervention of elevators, and that the amount is steadily increasing from year to year.

As has been already demonstrated, in the matter of shipping facilities, the statutes of North Dakota and the rules governing the distribution of cars enacted pursuant thereto give the grain producers of the state a practical if not a legal monopoly.

It is submitted that the foregoing conclusively shows a situation diametrically the opposite of that presented by the Munn and Budd cases, and necessarily compels a reversal of the judgment in this case, or a declaration that the principle of the cases mentioned has unlimited scope.

The Supreme Court of North Dakota in its opinion concedes that a situation similar in substance to that presented by the Munn and Budd cases must be presented in this case to render the principle of those cases applicable and in its attempt to produce a

similar situation that court follows the example set by the New York Court of Appeals in the Budd case, that is, instead of deciding the case on the record resorts to the doctrine of "common knowledge."

So far as the court took the pains to state tangible facts, we have no fault to find, because the record in connection with the statutes of the state show very readily that those facts have no foundation.

The court however undertook to state some general conclusions and if those conclusions are drawn from the specific facts stated, they are disposed of by showing that the facts upon which they are based are unfounded, but if the conclusions stated are drawn from facts not stated and which are not shown by the record we simply deny the correctness of the conclusions and assert that if the facts from which they are drawn were stated by the court, we could very readily dispose of them by comparison with the admitted facts in the record and existing statutes of the state.

In the opinion of the supreme court of the state the following facts, which have no foundation in the record are stated in an effort to bring this case within the range of the Munn and Budd cases:

I.

"The station where the elevator is located is the only place in the vicinity, or for miles around, where the producer can find either storage or a buyer for his grain."

Record page 58.

The answer to that statement is that if the farmer wishes to store his grain, the proper place to store it is in his granary where farmers from the beginning of time have stored their grain.

What is there, peculiar, extraordinary or excep-

tional, in a situation that would compel a farmer to store his grain in his own granary?

Is not the only extraordinary, peculiar or exceptional fact or circumstance in the case, the desire or attempt of the farmer to seize the granary of the plaintiff in error against his consent, instead of making use of his own granary.

II.

"It is conceived to be important to the seller that his grain should be in hand and accessible at the railroad station, where it can be disposed of any day when the market is favorable or when necessity compels a sale."

Record page 58.

The first answer of that statement is "that it is conceived to be equally important to a man who has invested his fortune in a grain elevator or warehouse for the purpose of buying grain that he be allowed to conduct his business in his own way, so long as he does not infringe the rights of any other person."

The second answer to that statement is that the record shows, and it is an admitted fact, in this case, that the plaintiff in error invested his capital in his elevator for the purpose of BUYING grain and not for the purpose of STORING grain for third persons, and that if he is compelled to store all grain that may be tendered to him "the principal business, to conduct which his capital was invested in said elevator, will be utterly ruined and annihilated for want of storage capacity to contain wheat purchased by him in the conduct of his said business, and respondent subjected to suits for damages for non-fulfillment of his said contracts."

Record page 6.

The statute in question, which has been sustained by the highest court of the state, attempts to do that which the wildest legislation of Granger days never attempted, that is, it seizes property which the record admits is devoted to the business of buying grain, and diverts it from that business to the business of STORING grain.

The Munn and Budd statutes regulated a business in its EXISTING FORM, while this statute attempts to CHANGE THE ESSENTIAL NATURE OF THE BUSINESS against the consent and protest of its owner.

III.

"The elevators and warehouses of the state have grown up as an inseparable adjunct of the farming interests of the state."

Record page 58.

This statement may be answered by the statement that farmers' granaries "have grown up as an inseparable adjunct of the farming interests of the state" and ought to be put to proper use.

With equal force it can be said that the dry goods and grocery stores "have grown up as an inseparable adjunct of the farming interests of the state," but it will not be contended that that fact justifies a farmer's alliance legislature in taking the dry goods and grocery stores from the control of their owners.

IV.

"While it is true that the railroads in the state are required by statute to furnish box cars to those who may desire to ship in carload lots, yet it appears in this case and it is a fact of common knowledge here, that this mode of shipping grain is wholly inadequate as a means of transporting to market the surplus grain

produced in this state, where the yield is as large as it frequently has been in years past.

Nor is shipping by car load lots so convenient to small producers, who more frequently than otherwise would be unable to hold a box car at a station long enough to enable them to haul their grain from a distance to fill such car."

Record page 59.

The record in this case shows as an admitted fact that from nothing in 1885 when the statute of that year (Chap 126) was enacted the situation was changed so that in 1890 "nearly fifty per cent of the entire grain product of North Dakota was shipped to Minneapolis and Duluth, Minnesota, by farmers without the intervention of elevators, warehouses or flathouses" and that "the amount of grain shipped in that manner is steadily increasing from year to year."

Record page 7.

If shipping by car load lots increased from nothing in 1885 to half the grain product of the state in 1890 —that is in five years—and "is steadily increasing from year to year," what proportion will be shipped in that manner in ten years?

The state court could have said as a matter of "common knowledge" that the farmers of North Dakota prior to 1885 demanded that they be given the privilege of shipping by car load lots, in order that they might get the profit that otherwise went to the grain buyers of the state and that that demand became the central issue on which the legislature that enacted chapter 126 of the laws of 1885 was elected and that that demand, at the 1885 session, crystalized into the form of a statute

The statement that shipping by carload lots is not so convenient to the farmer is met by the statement that it is more profitable to the farmer, hence the enormous increase in the amount shipped in that manner.

Chapter 123 of the laws of 1890 brought into existence loading platforms, at every station in the state at which ten persons petitioned therefor.

The farmer in the natural course of business must haul his grain from the farm to the railroad station and when he gets it there he has his choice of methods, either to unload from the wagon into the grain warehouse or from the wagon on the loading platforms into the cars.

We are not able to understand what the court meant to express by the statement "that this mode of shipping grain is wholly inadequate as a means of transporting to market the surplus grain produced in this state."

Record page 59.

The owners of elevators, warehouses and flathouses do not own railroads, and therefore do not transport any grain to market, but deliver it to the common carrier as do the farmers.

If the court meant to convey the idea that shipping grain by means of box cars "is wholly inadequate as a means of transporting to market the surplus grain" it would have been well to have accompanied that idea with a suggestion as to the existence of other means by which to transport the grain, because it is a matter of "common knowledge" that box cars alone are used for that purpose until the grain reaches water transportation.

It is true that the railroads are not able to transport a crop of 110,000,000 bushels, the product of

the two Dakotas and Minnesota for 1891, in sixty or ninety days, and this is a very fortunate thing for the producer.

When a new crop starts to move it is a matter of common knowledge that the price it commands is usually satisfactory, because the supply is reasonably proportioned to the demand, but the railroad facilities are such that within two weeks after the new crop begins to move the market is glutted with wheat, and the supply is out of all proportion to the demand and the price falls accordingly to a point where it is almost ruinous to the producer.

This is the case year after year.

If the farmer built a granary on his farm as he should do and stored his grain there, the grain product of three states would not be unloaded on the markets of Minneapolis and Duluth and from those markets onto Eastern markets within the first ninety days of the season, but would be delivered more evenly throughout the year, as the demands for home consumption and export call for it and this would result in a more steady market and uniform price.

Among other facts stated by the State Court as a matter of common knowledge is that the small producers more frequently than otherwise "would be unable to hold a box car at a station long enough to enable them to haul their grain from a distance to fill such car."

That statement may be met by statements which we make as a matter of "common knowledge, to-wit:

First.— That a box car as a general rule holds from four to five hundred bushels of grain.

Second.—That nine hundred and ninety-nine out

of one thousand farmers in North Dakota own and farm at least one quarter of a section of land and received it as a gift from the government.

Third.—That the threshing season in North Dakota does not commence until late in September, which accounts for the fact that there was 25,000 bushels of capacity in the elevator of plaintiff in error unoccupied on September 30th, 1891, when the alternative writ was issued in this case.

Fourth.—That the grain wagons used by farmers in North Dakota hold from one hundred to one hundred and twenty-five bushels of wheat.

Fifth—That farmers aid each other in hauling wheat to market.

Sixth.—To the above facts add the admitted fact "that the average farm in North Dakota does not exceed 160 acres in area; that the average yield of a quarter section of land in North Dakota does not exceed twenty-five hundred bushels" and it will become apparent "that the small producer more frequently than otherwise" produces at least several carloads of wheat each year and has the ability to get it to the railroad station when necessity or a favorable market requires.

V.

"With the existing limited facilities for storing, handling and shipping grain in this state, it is not an exaggeration to say that it would be impossible to market the larger part of the surplus grain raised in this state in any year of an average yield of wheat and other cereals without the aid of elevators and warehouses now standing at railroad stations, and placed there for the express purpose of receiving, grading and storing the grain and delivering it upon the cars."

Record page 59.

This statement is at war with the admitted facts in this case.

It is admitted that in 1890 nearly half the entire grain yield of the state was shipped by the farmers without the aid of elevators, and that the amount shipped in that manner is steadily increasing from year to year.

Record page 7.

The sole means of transporting the grain to market are the railroads, and with unlimited facilities for loading the grain it is difficult to understand how the farmers can be prevented from getting their grain to market.

VI.

"The appellant's elevator may be taken as fairly representative of the six hundred grain elevators, flathouses and warehouses which it appears by the answer exist in North Dakota."

Record page 58.

The plaintiff in error agrees with the court in that statement, so that it may be taken as true that all the grain warehouses in the state were constructed and are operated for the purpose which the answer alleges, and the demurrer admits the elevator of the plaintiff in error was constructed and is being operated for, and that is for the purpose of "BUYING" and not "STORING" grain of third persons.

It being admitted that the purpose for which these warehouses and elevators were constructed and for which they are being operated was not to "STORE" grain of third persons but to "BUY" grain, the statement in the opinion that they were erected "for the express purpose of receiving, grading and storing

the grain and delivering it upon the cars" can have no weight in this court for the reason that the case will be tried upon the record here.

VII.

"They (the elevators, etc.) have such a large and decisive work to do in the matter of transferring grain from the hands of the producer to the common carrier and to the buyer that their business has a relation to the public which is peculiar to them, and which lifts such business out of the common business pursuits of our people and places it in a separate class."

Record page 59.

What "large and decisive work" have these warehouses and elevators to do in the matter of transferring "grain from the hands of the producer * * * to the buyer?"

The elevators and warehouses of North Dakota have nothing whatever to do with transferring grain to the buyer—the grain product of North Dakota is delivered to the buyer at Minneapolis and Duluth by the railroads.

As was said by Caldwell J. in construing the statute in question in Great Northern Ry. Co. vs. Walsh, 47 Fed. Rept. 406: "There are no terminal points for interstate shipments of wheat in this state. This state exports, but does not import, wheat."

In the matter of transferring grain from "the producer to the common carrier" the record shows that in 1890 the farmers transferred nearly half of the entire grain product of the state to the common carrier, and that the amount transferred in that manner is steadily increasing from year to year.

Record page 7.

If the amount of grain transferred by the elevators and warehouses of the state from the producer to the common carrier decreased from 1885 to 1890 in an amount equal to nearly one-half of the entire grain product of the state, and is steadily decreasing from year to year as the record in this case admits, the work performed by them is anything but decisive.

The foregoing are the facts relied upon by the state supreme court, to bring this case within the range of the Munn case and it is submitted that the facts stated differ in no respect from those found in all farming communities throughout the United States.

Over a century of experience in this country has failed to develop any necessity for such legislation in any other state, and the fact that no such legislation, regulating the small grain buyers throughout an agricultural state, has heretofore found its way into the laws of any other state, even during the crazy days of "granger" excitement would seem to present a strong argument against the validity of this statute.

It is respectfully submitted that the facts disclosed by the record places this case without the rule of the Munn case and on this theory the case is submitted for the consideration of this court.

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IF THE STATE HAS NO POWER TO FIX ANY RATE FOR THE STORAGE OF GRAIN IN THE ELEVATOR OF PLAINTIFF IN ERROR, THE FACT THAT THE RATE FIXED IS A REASONABLE RATE, IS ENTITLED TO NO CONSIDERATION IN DETERMINING THE VALIDITY OF THE STATUTE.

The statute in question is constitutional or it is unconstitutional.

The power to fix a rate to be charged by the plain-

tiff in error for the storage of grain at his elevator exists or it does not exist.

If the power does not exist in the state, it cannot fix any rate whatever - reasonable or unreasonable.

The question presented by the record in this case is correctly stated by the supreme court of the state to be purely one of power.

In McCulloch vs. Maryland 4 Wheat, 439, it was said by Chief Justice Marshall: "Questions of power do not depend upon the degree to which it may be exercised.

If it may be exercised at all it must be exercised at the will of those in whose hands it is placed."

Applying the language just cited to the case of Munn vs. Illinois, 69 Ill., 99, Mr. Justice McAllister in his dissenting opinion said: "This principle was illustrated in McCulloch vs. Maryland, where it was not claimed that the particular tax levied by the state upon the United States bank would destroy or even embarrass that institution, *but the validity of the act was assailed wholly upon the nature of the power involved in it.*"

If the power to fix a rate for the storage of grain at the elevator of plaintiff in error existed, and the legislature in the exercise of that power fixed a rate, then the question might legitimately arise whether the rate fixed was a reasonable rate, but where there is a total want of power to fix any rate the question cannot arise.

The position of the plaintiff in error is that the power to fix the rate he shall charge does not reside in the state and, whether this question is tenable depends entirely upon the conclusion reached by this court as to whether the facts disclosed by the record

bring this case within the operation of the principle of the Munn case.

CHAPTER 126 OF THE LAWS OF 1891 DEPRIVES THE PLAINTIFF IN ERROR OF HIS LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW IN THE FOLLOWING RESPECTS:

I.

The statute compels the plaintiff in error to receive grain of third persons for storage so long as there is unoccupied space in his elevator and thereby, against his protest changes the essential nature of his business, so that if the statute iss ustained in this court he must cease to do business as a grain buyer and devote his elevator to the storage of grain or go out of the grain business.

This is not a mere deprivation of liberty or property without due process of law, but amounts to an arbitrary confiscation of the property.

See the judgment in this case.

Record pages 33 and 34.

Within five months after the wheat crop begins to move it is practically all out of the state, and an elevator used solely for storage purposes would remain idle the remainder of the year.

The elevators of North Dakota are operated for the purpose of buying grain, which is sold at an advanced price on the markets of Minneapolis and Duluth, and from this source the elevator owner derives his profit on his investment.

The difference between the results of using elevators in farming districts for the purpose of buying grain and for the purpose of storing grain is the difference that distinguishes prosperity from bankruptcy,

and this statute forces the plaintiff in error to take the latter road, and in so doing violates his constitutional rights.

II.

The statute assumes to regulate the price plaintiff in error shall charge for the use of his property.

III.

The statute compels the plaintiff in error to insure all grain stored in his elevator for third persons.

IV.

In Yick Wo. vs. Hopkins, 118 U. S., 356, 373, this court, in determining the validity of the ordinance assailed in that case, said: "Though law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

Section 2, of chapter 126 of the laws of 1891, gives to the Railroad Commissioners of North Dakota power to supervise the handling, weighing and storage of grain and seeds; to establish all necessary rules and regulations for the weighing of grain and for the management of the public warehouses of the state, as far as such rules and regulations may be necessary to enforce the provisions of this act, or any law of this state in regard to the same.

Pursuant to the statute just mentioned the Railroad Commissioners on August 1st, 1891, enacted twenty-two rules, many of which simply reiterate the provisions of chapter 126, Laws of 1891.

(These rules appear in full, record pages 10 to 15, inclusive.)

But sections 16, 17 and 18 are more arbitrary in their provisions, and operate as a greater invasion of the constitutional rights of the plaintiff in error than any of the provisions of the statute itself.

Rules 16 and 17 require the plaintiff in error at considerable expense to himself, to expose all the details connected with the conduct of his business, not only to the public but to his competitors, and this we insist that the state cannot compel him to do.

Rule 18 requires the plaintiff in error to furnish to the commissioners of railroads a daily report of the price to be paid by him at his elevator, and then proceeds to do a thing that was done in Rome and later in England four or five centuries ago, but which has never been attempted heretofore in modern times, and that is, it fixes absolutely the price which the plaintiff in error shall pay for every bushel of wheat purchased by him.

The rule provides that: "The price shall be based upon the Minneapolis price at which the wheat purchased can be sold and delivered on the day before, deducting freight from the station to Minneapolis, and not to exceed four (4) cents (and fractions) per bushel for all costs of handling the same

"Notice to agents of change of price shall be posted in a conspicuous place in each elevator."

If wheat closed at Minneapolis on September 1st at $1.10 and opened the following morning, which has not infrequently been the case, at $1.00, the plaintiff in error under this rule would be obliged to pay $1.10 at Grand Harbor on the 2nd of September, less freight from Grand Harbor to Minneapolis and

four cents per bushel for handling the same. In other words, plaintiff in error would have to pay more for the wheat on the second of September than it could be sold for on the markets of the world.

It is submitted that the statute in question, as well as the rules enacted pursuant thereto, deprive the plaintiff in error of his liberty and property without due process of law, contrary to the provisions of section 1 of the 14th Amendment of the Constitution to the United States.

Yates vs. Milwaukee, 10 Wall. 492.

Pumpelly vs. Green Bay Co., 13 Wall. 166.

Taylor vs. Porter, 4 Hill. 140.

THE FOLLOWING ARE THE STATUTES REFERRED TO HEREIN AND PERTINENT TO THIS CASE:

RAILROAD COMMISSION.

CHAPTER 126.

AN ACT to Provide for the Establishment of a Board of Railroad Commissioners, defining their duties, and to Regulate the Receiving and Transportation of Freight on Railroads in this Territory:

Be it enacted by the Legislative Assembly of the Territory of Dakota:

§ 9. Railroad Companies Required to Furnish Cars to all Persons, etc.] It shall be the duty of all railroad corporations doing business in this Territory, upon reasonable notice, to furnish suitable cars to any and all persons who may apply therefor for the transportation of any and all kinds of freight, and to secure and transport such freight with all reasonable dispatch, and provide and keep suitable facilities for the securing and handling of the same at any depot on the line of its road, and also to receive and transport in like manner the empty and loaded cars furnished by any connecting line of road, to be delivered at any station or stations on the line of its road, to be loaded or discharged, or reloaded and returned to the road so connecting, and for compensation it shall not demand or receive any greater sum than is accepted by it from any other connecting railroad for similar service.

§ 10. Shall Transport Grain.] Any railroad company doing business in this Territory, when desired

by any person wishing to ship grain over its road, shall receive and transport such grain in bulk within a reasonable time, and permit the same to be loaded either on its track adjacent to its depot, or at any warehouse or side-track without distinction, discrimination or favor between one shipper and another, and without discrimination or distinction as to the manner in which such grain is offered for transportation, or as to the person, warehouse, elevator or the place where or to which it may be consigned. Every railroad company shall permit connections to be made and maintained in a reasonable manner with its track, to and from any warehouse, elevator or mill adjacent to any station on its line, without reference to its size or capacity, where grain or flour is or may be stored; *Provided, however*, That such railroad company shall not be required to pay the cost of making and maintaining said connection, or of the siding or switch-track necessary to make the same; and *Provided, further*, That a majority of the commissioners appointed under this act shall direct such railroad to make such connection and siding. Grain shall also be received from wagons or sleighs in car load lots, the same as when offered from warehouses or elevators, allowing reasonable time for loading the cars, and the cars shall be placed in a convenient place, easy of access.

Approved March 6 1885

CHAPTER 110.

THEIR POWERS AND DUTIES.

AN ACT to Amend An Act Entitled "An Act to Provide for the Establishment of a Board of Railroad Commissioners, Defining their Duties, to Regulate the Receiving and Transportation of Freight on Railroads in this Territory, Passed at the Sixteenth Legislative Assembly of the Territory of Dakota, and Approved, March 6th, 1885.

Be it Enacted by the Legislative Assembly of the Territory of Dakota:

§ 5. Railroads Required to Ship Without Discrimination.] Any railroad company doing business in this Territory, when requested by any person wishing to ship grain on its road shall receive and transport such grain in bulk, and permit the same to be loaded either on its track adjacent to its depot, or at any warehouse or side track, at any station, without discrimination or distinction as to the manner or condition in which such grain is offered for transportation, or as to the person, corporation, warehouse, elevator or place when or to which it may be consigned, and shall receive the same, in car load lots, from wagons, sleighs or other vehicles, on their side tracks at any station, the same as when offered from warehouses, elevators, allowing a reasonable time for loading them, and for the purpose of loading the same, shall place the cars in convenient places, easy access by wagon or sleighs or other vehicles, and shall after the same have been loaded, whether at side track, elevator, warehouse or depot without unnecessary delay, proceed to ship the same to the place where the same is consigned.

6 §. Track from Elevator to Railroad.] It shall be lawful for the owner or owners of any elevator,

warehouse or mill at any station on the line or at the termination of any railroad in this Territoty, to construct from such elevator, warehouse or mill, a railroad track to the track of any railroad company, and to connect with the same by switch at his or their own expense, and it shall be the duty of any such railroad company to allow such connection. Such side track and switch shall at all times be under the control and management of and kept in repair by such railroad company, provided, that the party for whose benefit such side track and switch shall be constructed, shall pay to such railroad company the actual cost of maintaining such side track and switch, which payment shall be made monthly, and in case such payment shall not be made as provided, then and in that case the obligations of this section upon said railroad companies shall from and thereafter cease and be inoperative as against them until such costs and expenses are fully paid.

§ 7. Division of Cars.] When any railroad company doing business in this territory, shall be unable for any reasonable cause to furnish cars at any railway station, or side track in accordance with the demands made by all persons demanding cars at such station or side track for the shipment of a car load lot or lots of freight, such cars as are furnished shall be divided daily as equally among the applicants until each shall have received one car, when the balance shall be divided ratably to each shipper in proportion to the amount of daily receipts of grain or other freight, or to the amount of grain offered at such station or side track, provided that every application made in good faith on an earlier day shall be filled before supplying any car to any applicant of a suc-

ceeding day.

§ 12. Time to Remove Property from Cars.] Any consignee, or person entitled to receive the delivery of any freight shipped to him in car load lots, by any railroad company, shall have twenty-four hours free of expense after notice of arrival by the company to the consignee or person entitled to receive the same in which to remove the same from the cars of such railroad company, which said twenty-four hours shall be held to embrace such time as the car containing such property is placed and kept by such railroad company in a convenient and proper place for unloading, and it shall not be held to be in a proper place for unloading unless it can be reached with teams or other suitable means for removing the property from the cars, and reasonably convenient to the depot of the company at which it is accustomed to receive and unload merchandise consigned to that station or place.

§ 20. Penalty on Railroad Corporation—Separate Offenses.] Any railroad company found guilty of violating any of the provisions of this act shall be fined in a sum not less than $1,000 nor more than $10,000, to which shall be added the costs of action, and each day's refusal or neglect of any railroad company, to do or perform any act required by this act to be done, and each day's commission of any act or thing prohibited by this act shall be taken to be a separate offense and such railroad company may be prosecuted aud convicted for each day's offense separately, and the conviction thereof shall not be a bar to the prosecution and conviction of the same on any other day.

§ 21. Fine Not a Bar to Individual Action.] Such conviction or fine, or the payment of any fine

shall not operate as or be a bar to the prosecution of such railroad company by any person, company or corporation sustaining damage by reason of the violation of any of the provisions of this act, but in addition thereto any person, company or corporation suffering or sustaining any damage by reason of such violation by any railroad company may maintain an action in his or their own name and behalf against such company and in case of a recovery the court shall assess treble damage against such offending railroad company in favor of the party suffering such damage or injury.

Approved March 8 1889

CHAPTER 122.

[S. F. 41.]

TO REGULATE COMMON CARRIERS AND DEFINE THE DUTIES OF THE COMMISSIONERS OF RAILROADS.

AN ACT Entitled "An Act to Regulate Common Carriers, and Defining the Duties of the Commissioners of Railroads in Relation Thereto, in the State of North Dakota.

Be it Enacted by the Legislative Assembly of the State of North Dakota.

(*b*) Uniform Distribution of Cars—Commissioners to Establish and Publish Rules.] The railroad commissioners shall, on or before August 1st of each year, adopt a system of uniform rules which they may change from time to time as found necessary, governing the distribution of cars to be loaded, among applicants at stations and sidetracks on all railroads in this state, and they shall serve a copy of such rules upon all railroad ruperintendents in this state, which shall be sufficient notice to such railroad company, and said rules shall have all the force and

effect of an order under the provisions of this act, and the disregard of the requirements or refusal to obey the requirements of such rules shall subject and make liable said common carrier to the pains and penalties made and provided in such case. The Railroad Commissioners shall publish said rules in one newspaper in each county having a railroad station within its limits, as elsewhere provided in this act for the publishing of rates, and shall also cause a copy of said rules to be posted in some public place at each station and side track for the information of shippers. If any railroad company shall refuse or neglect to furnish cars as provided in the rules aforesaid at any station or side-track, complaint having been made to the Railroad Commissioners or any one of them, it shall be their duty to immediately enquire into the cause of such delay in furnishing the cars demanded, and if they find just cause for complaint they are empowered and required to make such orders and rules as they may deem to be right and just to all parties concerned, the same to be enforced as other orders and rules are enforced under the provisions of this act; *Provided*, All railroad corporations, in case of a shortage of cars, shall be required to furnish at all times each branch or division of its roads its just proportion of cars required for the transportation of freight according to the amount offered for shipment on each branch or division.

Approved March 19 1890

CHAPTER 126.

[S. F. 43.]

PROVIDING FOR TRANSFER OF FREIGHT AT CROSSINGS.

AN ACT Entitled "An Act to Provide for the Transfer of Freight at Railroad Crossings and the Maintenance of Depots at the Same."

Be it Enacted by the Legislative Assembly of the State of North Dakota.

§ 1. Duty of Railroad Companies to Provide Means of Transfer at Crossings.] In all cases where any line of railroad shall cross or intersect any other line of railroad in this state it shall be the duty of the railroad companies owning or operating such intersecting railroad lines within sixty days, as hereinafter required so to do, to provide at such crossing or intersection suitable and sufficient facilities, such as building Y's or other tracks, platforms, warehouses, depots, etc., for transferring cars and for accommodating and transferring passengers and traffic of all kinds and classes from one such line of railroad to another and to afford equal and reasonable facilities for the interchange of cars and traffic between their respective lines.

§ 2. Transfer Facilities to be Afforded if Petitioned For.] Whenever any twenty or more resident freeholders residing within ten miles of the crossing or intersection of any railroad lines shall petition said railroad companies owning or operating said intersecting railroad lines, it shall be the duty of such railroad companies to build, equip and operate within sixty days thereafter the necessary Y's, tracks and switches necessary for the transfer of all kinds and classes of freight by car lots from one such line to the other.

§ 3. Warehouses, Depots, etc., to be Built if Petitioned For.] Whenever any fifty resident freeholders residing within ten miles of any crossing or intersection of any railroad lines shall petition said railroad companies owning or operating said intersecting lines of railroads, it shall be the duty of said railroad companies within sixty days thereafter to build, equip, operate and maintain suitable Y's, tracks, switches and also a suitable warehouse and depot for the accommodation of passengers and of freight of all kinds and classes, and the said railroad companies shall maintain an agent there who shall be a telegraph operator, provided with all necessary instruments, wires, etc., necessary for the transacting of business in such manner as the business of other stations on their respective lines is usually transacted.

§ 4. Railroad Companies, How Notified.] Upon the presentation of a petition, signed by the requisite number of freeholders, as provided by Sections 2 and 3 of this act, it shall be the duty of the clerk of court of the county in which said railroad crossing or intersection is situated, as mentioned in said petition, to transmit within three days thereafter (upon receipt of fifty (50) cents for filing and one (1) dollar for a certified copy thereof) a certified copy of the said petition to the general manager of each of said intersecting lines of railroad, and the said clerk of the court shall thereupon make a suitable record of the sending of such copies as to time, etc., which record, together with the original petition, shall be *prima facie* evidence in any court of law of such notification to said railroad companies.

§ 5. Duties of Railroad Commissioners in Case of Failure to Comply With This Act.] If any railroad

company or companies to whom such petitions are addressed shall fail to comply with any of the provisions of this act within the time prescribed by Section 1 of this act, any person who may have signed any petition under Sections 2 or 3 may appeal to the Railroad Commissioners by filing with said Railroad Commissioners an affidavit setting forth the fact that said petition has not been granted, and also a certified copy of the original petition; it shall then be the duty of said Railroad Commissioners to condemn all lands necessary for the requirements of the prayer of said petition in such manner as lands are usually condemned for public purposes; *Provided, however,* That said Railroad Commissioners cannot easily obtain the right-of-way or a deed to such lands as may be necessary in building any Y's, tracks, depots or platforms; *Provided, further,* That in all cases where there is room upon the rights of way of any intersecting lines of railroad the Commissioners shall build all tracks, Y's, switches, depots, platforms, etc., thereon immediately proceed to build such tracks, Y's, switches, depots, platforms, etc., as are required by the different sections of this act to be built, and the cost thereof shall immediately thereon become a lien upon the rolling stock, road bed, equipments, earnings, etc., of such railroad companies and may be by such Railroad Commissioners collected by law in such case made and provided.

§ 6 Actions Against Railroad Companies, How Brought.] In all cases where it becomes necessary for the Railroad Commissioners to build any tracks, Y's, switches, depots, platforms, etc., under any of the provisions of this act, and the railroad companies owning or operating any intersecting lines fail to pay

for the same within thirty days after being duly notified of and presented with an itemized account of one-half the costs of constructing the same, the said Railroad Commissioners are hereby empowered to present the State Auditor with a verified account in writing of the cost of building of any such tracks, Y's, switches, platforms, etc., and the costs of all lands necessarily condemned or bought in the construction of the same, and the State Auditor shall thereupon draw his warrant upon the State Treasurer for the amount thereof in favor of said Railroad Commissioners. Immediately upon receipt of such warrant it shall be the duty of the Railroad Commissioners to commence an action against all railroad companies interested for the recovery of the costs of the construction of all such Y's, tracks, switches, platforms, depots, etc. Said action shall be in the name of the State as plaintiff, and shall be maintained and prosecuted as all such actions are maintained. Approved Feb

CHAPTER 123.

[H. F. 54.]

RAILROADS TO BUILD PLATFORMS TO FACILITATE SHIPMENT OF LIVE STOCK, ETC.

AN ACT to Facilitate the Shipment of Live Stock, Grain and Other Commodities.

Be it Enacted by the Legislative Assembly of the State of North Dakota.

§ 1. Railroads to Build Platforms.] Every railroad company or corporation doing business in this State shall within sixty days after this act shall go into effect, upon notice from the Commissioners of Railroads, build, erect and complete one or more platforms for the transfer of live stock, grain and other

company or companies to whom such petitions are addressed shall fail to comply with any of the provisions of this act within the time prescribed by Section 1 of this act, any person who may have signed any petition under Sections 2 or 3 may appeal to the Railroad Commissioners by filing with said Railroad Commissioners an affidavit setting forth the fact that said petition has not been granted, and also a certified copy of the original petition; it shall then be the duty of said Railroad Commissioners to condemn all lands necessary for the requirements of the prayer of said petition in such manner as lands are usually condemned for public purposes; *Provided, however,* That said Railroad Commissioners cannot easily obtain the right-of-way or a deed to such lands as may be necessary in building any Y's, tracks, depots or platforms; *Provided, further,* That in all cases where there is room upon the rights of way of any intersecting lines of railroad the Commissioners shall build all tracks, Y's, switches, depots, platforms, etc., thereon immediately proceed to build such tracks, Y's, switches, depots, platforms, etc., as are required by the different sections of this act to be built, and the cost thereof shall immediately thereon become a lien upon the rolling stock, road bed, equipments, earnings, etc., of such railroad companies and may be by such Railroad Commissioners collected by law in such case made and provided.

§ 6 Actions Against Railroad Companies, How Brought.] In all cases where it becomes necessary for the Railroad Commissioners to build any tracks, Y's, switches, depots, platforms, etc., under any of the provisions of this act, and the railroad companies owning or operating any intersecting lines fail to pay

for the same within thirty days after being duly notified of and presented with an itemized account of one-half the costs of constructing the same, the said Railroad Commissioners are hereby empowered to present the State Auditor with a verified account in writing of the cost of building of any such tracks, Y's, switches, platforms, etc., and the costs of all lands necessarily condemned or bought in the construction of the same, and the State Auditor shall thereupon draw his warrant upon the State Treasurer for the amount thereof in favor of said Railroad Commissioners. Immediately upon receipt of such warrant it shall be the duty of the Railroad Commissioners to commence an action against all railroad companies interested for the recovery of the costs of the construction of all such Y's, tracks, switches, platforms, depots, etc. Said action shall be in the name of the State as plaintiff, and shall be maintained and prosecuted as all such actions are maintained and prosecuted. Approved February 12 1890

CHAPTER 123.

[H. F. 54.]

RAILROADS TO BUILD PLATFORMS TO FACILITATE SHIPMENT OF LIVE STOCK, ETC.

AN ACT to Facilitate the Shipment of Live Stock, Grain and Other Commodities.

Be it Enacted by the Legislative Assembly of the State of North Dakota.

§ 1. Railroads to Build Platforms.] Every railroad company or corporation doing business in this State shall within sixty days after this act shall go into effect, upon notice from the Commissioners of Railroads, build, erect and complete one or more platforms for the transfer of live stock, grain and other

commodities from wagons or otherwise to cars at each and every station designated in said notice; said platform to be erected where there will be safety to life and property.

§ 2. Platforms, How built.] Each platform shall be not less than twelve feet wide and thirty-two feet long, extending two feet and eight inches above the rails of the track, with suitable approaches to and from said platform to admit the driving of loaded teams thereon.

§ 3. Penalty for Neglect to Build Platforms.] Every railroad company or corporation neglecting or refusing to comply with the requirements of this act after having been properly notified, shall be deemed guilty of a misdemeanor, and be subject to a fine of not less than five hundred (500) dollars for every thirty days such failure shall continue after notice as aforesaid.

§ 4. Duty of Commissioners to Notify Railroads.] Every Commissioner of Railroads who shall fail to notify such railroad company after receiving a petition signed by ten taxpayers residents of the place or its vicinity where such platform is to be erected, shall be deemed guilty of a misdemeanor, and shall be fined not less than one hundred (100) dollars nor more than three hundred (300) dollars for each offense; *Provided*, Said Commissioner of Railroads shall, upon examination, deem such platform or platforms necessary.

§ 5. When Platforms to be Enlarged.] The Commissioners of Railroads shall have power to order an enlargement of such platforms whenever petitioned to that effect, and whenever the capacity of such platform is in their judgment clearly insufficient for

the accommodation of the public.

§ 6. Platform Scales] Every railroad company shall allow suitable scales to be erected, either upon the platform or upon the grounds adjacent thereto, if upon their right of way, for weighing and shipping purposes.

§ 7. Emergency.] Whereas, an emergency exists, in that the platform provided for in this bill will be needed before July; therefore, this act shall take effect and be in force from and after its passage and approval.

Approved February 17, 1890.

At the special session of the legislature in the year 1892, the above chapter was amended so as to read as follows:

A bill for an act to amend sections one and two of chapter 123 of the laws of 1890.

Be it enacted by the Legislative Assembly of the State of North Dakota:

That section 1 of chapter 123 of the laws of 1890 be and the samc is hereby amended to read as follows:

Every railroad company or corporation doing business in this state, shall within sixty days after notice from the Commissioners of Railroads, built, erect and complete one or more platforms for the transfer of live stock, grain and other commodities from wagons or otherwise at each and every station designated in said notice: Said platforms to be erected where there will be safety to life and property.

That section 2 of chapter 123 of the laws of 1890 be and the same is hereby amended to read as follows:

Each platform shall be not less that twelve feet wide and thirty-two feet long, extending six feet

above the rails of the track with suitable approaches to and from said platform to admit the drawing of loaded teams thereon.

SUB. A. If any railroad company after receiving notice as provided for in this section, shall fail, refuse or neglect to build and erect said platforms as required by this act, within the required sixty days, the Commissioners of Railroads are hereby authorized and empowered, and it is made their duty, to notify such railroad company to appear before them at a certain time and place to show cause, if any there be, why said commissioners should not issue an order requiring such railroad company to comply with the requirements of this act. Said commissioners of railroads shall have power, after such hearing, to issue an order upon said railroad company, commanding them to build and erect such platform as contemplated by this act; Providing, said commissioners of railroads shall, upon such examination and hearing, deem such platform or platforms necessary.

CHAPTER 124.

[H. F. 172.]

REGULATING SHIPMENT OF LIVE STOCK AND GRAIN.

AN ACT Relating to the Shipment of Live Stock and Grain.

Be it enacted by the Legislative Assembly of the State of North Dakota.

§ 1. Bill of Lading to State Number of Stock.] Whenever any shipper of hogs, cattle, sheep, horses or other animals shall present his stock at any railroad station, and to any railroad agent in the State of North Dakota, for purposes of transportation, it shall be the duty of said railroad agent to count or

cause to be counted said hogs, cattle, sheep, horses or other animals, and the number so counted shall be by the agent named in the bill of lading or receipt for said stock. And if said railroad agent neglect or refuse to count or have counted said stock, then the railroad company employing said agent shall be held responsible for the number of animals specified in the bill of lading according to shipper's count.

§ 2. Shipper's Right to Put More Than One Kind of Stock or Grain in Car.] Whenever any shipper shall order one or more cars from any railroad company for the purpose of transportation of stock or grain, he shall have the right and privilege to put in said car or cars two or more species of live stock or different kinds of grain; and no railroad company or railroad agent shall charge for any car in which is shipped two or more species of live stock any greater prices than are charged when only one species of said stock is shipped therein, nor shall said railroad agent or railroad company charge any greater sum when two or more kinds of grain are shipped in any car than is charged when only one kind of grain which is in said car is shipped; *Provided*, That said different species of stock or kinds of grain which are placed in said car or cars do not exceed the maximum limit of pounds allowed by law and by the railroad company when only one species of live stock or one kind of grain is shipped in said car or cars; *Provided, further*, That when more than one kind of stock or grain shall be shipped in the same car, the highest rate may be the rate of freight to be charged.

§ 3. Responsibility of Railroad Company for Violation of This Act.] Any loss sustained by any shipper from the refusal on the part of any railroad com-

pany to conform to the requirements of this act shall be assessed and collected as any other damages and losses are assessed and collected against railroad companies.

Approved February 10, 1890.

WAREHOUSES.

CHAPTER 126.

[H B No. 212.]

REGULATING GRAIN WAREHOUSES, AND WEIGHING AND HANDLING OF GRAIN, ETC.

AN ACT to Regulate Grain Warehouses and the Weighing and Handling of Grain, and defining the Duties of the Railroad Commissioners in Relation Thereto.

Be it Enacted by the Legislative Assembly of the State of North Dakota.

§ 1. Powers.] That the duties imposed by the provisions of this act and the powers conferred therein devolve upon the Board of Railroad Commissioners.

§ 2. To Supervise the Handling, Weighing and Storage of Grain] That it shall be the duty of the Railroad Commissioners of the State of North Dakota to supervise the handling, weighing and storage of grain and seeds; to establish all necessary rules and regulations for the weighing of grain and for the management of the public warehouses of the State, as far as such rules and regulations may be necessary to enforce the provisions of this act, or any law in this State in regard to same; to investigate all complaints of fraud or oppression in the grain trade of this State, and correct the same as far as it may be in their power.

§ 3. Printing and Publishing Rules.] The rules and regulations so established shall be printed and published by said Railroad Commissioners in such manner as to give the greatest publicity thereto and the same shall be in force and effect until they shall have been changed or abrogated by said Commissioners in a like public manner.

§ 4. Public Warehouses Defined.] All buildings, elevators or warehouses in this State, erected and operated, or which may hereafter be erected and operated by any person or persons, association, co-partnership, corporation or trust for the purpose of buying. selling, storing, shipping, or handling grain for profit, are hereby declared public warehouses, and the person or persons, association, co-partnership or trust owning or operating said building or buildings, elevator or elevators, warehouse or warehouses which are now or may hereafter be located or doing business within this State, as above described, whether said owners or operators reside within this State or not, are public warehousemen within the meaning of this act, and none of the provisions of this act shall be construed so as to permit discrimination with reference to the buying, receiving and handling of grain of standard grades, or in regard to parties offering such grain for sale, storage or handling at such public warehouses, while the same are in operation.

§ 5. Bond]. That the proprietor, lessee or manager of any public warehouse or elevator in this State shall file with the Railroad Commissioners of the State a bond to the State of North Dakota, with good and sufficient sureties, to be approved by said Commissioners of Railroads in the penal sum of not less

than $5,000 nor more than $75,000 in the discretion of said Commissioners, conditioned for the faithful performance of duty as public warehousemen and a compliance with all the laws of the State in relation thereto. One bond only need be given for any line or lines of elevators or warehouses owned, controlled or operated by one individual, firm, corporation or trust; said bond specifying the location of each elevator or warehouse operated by said individual, firm, corporation or trust and be in sufficient amount, at the discretion of the Commissioners aforesaid, to protect holders of outstanding tickets.

§ 6. Warehouse receipts, what to contain.] All owners of such elevators and warehouses shall, upon the request of any person delivering grain at such warehouse, give a warehouse receipt therefor, subject to the owner or consignee, which receipt shall bear date corresponding with the receipt of the grain, and shall state upon its face the quantity and grade fixed upon the same. All warehouse receipts issued for grain received shall be consecutively numbered, and no two receipts bearing the same number and series shall be issued during the same year. No warehouse receipt shall be issued except upon actual delivery of grain into such warehouse. No such warehouseman shall insert in any warehouse receipt issued by him any language in anywise limiting or modifying his liability as imposed by the laws of this State.

§ 7. What Storage Receipts shall Express.] Any storage receipt issued within the boundaries of this State shall provide by express agreement that at the option of the original holder of such receipt, the kind, quality and quantity of grain for which such receipt was issued shall be delivered back to him at

the same place where it was received, upon the payment of a reasonable charge per bushel for receiving, handling, storing and insurance charges, such charges to be fixed by express terms in the storage receipt at the time of receiving the grain at the elevator or warehouse, and at the time of issuing the receipt; *Provided*, That no charges shall be made for cleaning grain unless such grain has been actually cleaned; *Provided, further*, Nothing in this section shall be construed to mean the delivery of the identtical grain specified in the receipt so presented; but an equal amount of the same grade, excepting in case of wheat placed in special bin.

§ 8. Bailment Not a Sale—Insolvency.] Whenever any grain shall be delivered to any person, association, firm, corporation or trust, doing a grain, warehouse, or grain elevator business in this State and the receipts issued therefor, providing for the delivery of a like amount and grade to the holder thereof in return, such delivery shall be a bailment, and not a sale of the grain so delivered; and in no case shall the grain so stored be liable to seizure upon process of any court in action against such bailee, except actions by owners of such warehouse receipts to enforce the terms of the same, but such grain shall at any and all times, in the event of failure or insolvency of such bailee, be first applied exclusively to the redemption of outstanding warehouse receipts for grain so stored with such bailee. And in such event grain on hand in any particular elevator or warehouse shall first be applied to the redemption and satisfaction of receipt issued from such warehouse.

§ 9. Larceny—Punishment.] Every person and every member of any association, firm, trust or corporation, doing a grain, warehouse or grain elevator business in this State, who shall after demand, tender and offer as provided in Section 8 of this act, willfully neglect or refuse to deliver, as provided by said Section 8, to the person making such demand, the full amount of grain, or the grade or market value thereof which such person is entitled to demand of such bailee, shall be deemed guilty of larceny and shall, on conviction thereof, be punished by a fine or imprisonment or both, as is prescribed by law for the punishment for larceny.

§ 10. Attorney General—States Attorney.] The Attorney General of the State shall be *ex-officio* attorney for the Railroad Commissioners and shall give them such counsel and advice as they may from time to time require, and he shall institute and prosecute any and all suits which said Railroad Commissioners may deem expedient and proper to institute and he shall render to such Railroad Commissioners all counsel, advice and assistance necessary to carry out the provisions of this act or any law which said Commissioners are required to enforce according to the true intent and meaning thereof. In all criminal prosecutions against a waehouseman for a violation of any of the provisions of this act, it shall be the duty of the states attorney of the county in which such prosecution is brought to prosecute the same to a final issue.

§ 11. Rates to be Established and Maintained.] The charges for storage and hauling [handling] grain shall not be greater than the following schedule: For receiving, elevating, insuring, delivering and

twenty days' storage, two (2) cents per bushel. Storage rates, after the first twenty days, one-half (½) cent for each fifteen days or fraction thereof, and shall not exceed five (5) cents for six months. The grain shall be kept insured at the expense of the warehousemen for the benefit of the owner.

§ 12. Penalty for the Violation of the Provisions of This Act.] That any person, association, firm, trust or corporation, or any representative thereof who shall knowingly cheat or falsely weigh any wheat or other agricultural products, or who shall violate the provisions of any section of this act, or shall do or perform any act or thing therein forbidden, or who shall fail to do and keep the requirements as herein provided, shall be deemed guilty of a misdemeanor and shall, on conviction thereof, be subject to a fine of not less than two hundred ($200) dollars nor more than $1,000, and be liable in addition thereto to imprisonment for not more than one year in the State Penitentiary, at the discretion of the court.

§ 13. Repeal.] Chapter 130, passed by the Seventeenth Legislative Assembly of the Territory of Dakota, approved March ...., 1887, and Chapter 187 and Chapter 138 of the Laws of 1890 and Chapter 62, passed by the Eighteenth Legislative Assembly of the Territory of Dakota, approved March 8, 1889, and all other acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

§ 14. Emergency.] That, whereas, an emergency exists in that there is at present no code of intelligible warehouse laws upon the statute books of North Dakota, therefore this law shall be in force and effect from and after its passage and approval.

Approved March 7, 1891.

The statutes quoted afford unlimited facilities to the producer in North Dakota for the transportation of the products of his farm and render him entirely independent of the local grain buyers.

CONCLUSION.

The doctrine of the Munn case practically had its origin in this court, and recognizing that fact the state courts felt that this court should fix the limits within which that doctrine should be operative and this feeling no doubt led to the conclusion reached by the state courts in this case.

If the statute in question had been held unconstitutional in the state courts, the ruling of those courts would not be subject to review in this court.

In the main opinion in the supreme court of North Dakota it is said by Mr. Justice Wallin: "One further consideration may be mentioned. If the court entertained doubt of the constitutionality of chapter 126 of the laws of 1891 much more serious than we do in fact entertain, we should yet deem it our duty to give the statute the benefit of such doubt. This course is in accord with an established rule of statutory construction.

State vs. Fraser, I. N. D. 425.

Besides, by overruling constitutional objections urged against the statute the case will be in a position to be reviewed by the supreme court of the United States, while, on the other hand, should we declare against the validity of the statute no such review could be had.

In his concurring opinion Mr. Chief Justice Corliss said: "I agree to the judgment in this case with reluctance.

I am of the opinion that the doctrine of the Munn and Budd cases is unsound.

I admit that all authority is in favor of the opinion in this case, but I have an abiding conviction that the dissenting opinions in the Munn and Budd cases embody the true conception of American liberty. * * * *

While there is great difference between the facts of the (this) case and the facts in the Munn and Budd cases, it may be that this difference is not of such a nature as to distinguish this case from those in principle. My associates are clear on this point.

I confess that I have doubts about it.

My views, however, cannot affect the decision and the federal supreme court must ultimately determine this question.

Whatever I think about it will be of no weight before that court, which must settle for itself the limits of the doctrine it has enunciated.

If that doctrine is to be much extended I greatly feal that our boast of liberty will be found "full of sound and fury signifying nothing."

I could add nothing to what has been said in the dissenting opinions in those cases with such power of reasoning, nor do I regard this as the court in which to express a dissent as to the doctrine.

Such dissents are proper in that court which ought to declare the rule on this subject for the whole nation in all its courts, state and national. * * *

Yielding my individual judgment to higher authority, to which I feel it my duty to submit, I agree to the affirmance of the judgment."

In the state supreme court this case was argued at great length and all the authorities bearing upon the

question involved were cited, but in presenting the case to this court we have not thougnt it advisable to file a ponderous brief, inasmuch as the question presented is very familiar to every member of the court and has been exhaustively argued in this court by eminent counsel in the Budd case within the past year.

Confident that the principle of the Munn case will not be extended to the great distance necessary to make it applicable to the case at bar, this case is submitted for the consideration of this court.

J. F. McGEE,
Attorney for Plaintiff in Error,
Minneapolis, Minn.

Office Supreme Court U. S.
FILED.
DEC 14 1892
JAMES H. McKENNEY,
CLERK.

153-391.

SUPREME COURT

—OF THE—

UNITED STATES.

OCTOBER TERM, 1892.

Case No. 15,073. Term No. 1103.

NORMAN BRASS,

Plaintiff in Error,

vs.

THE STATE OF NORTH DAKOTA,
EX. REL. LOUIS W. STOESER,

Defendant in Error.

Brief for Defendant in Error.

C. D. O'BRIEN,
Attorney for Defendant in Error.

SUPREME COURT

OF THE UNITED STATES.

October Term, 1892.

NORMAN BRASS,
Plaintiff in Error,

vs.

STATE OF NORTH DAKOTA,
EX. REL. LOUIS W. STOESER,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

This action arose upon the petition of defendant in error, for an alternative writ of mandamus to compel the plaintiff in error to store defendant's grain in the elevator or warehouse of plaintiff in error at the rate of compensation fixed by section 11, of chapter 126, of the laws of 1891, of the state of North Dakota. The district court of

Ramsey county in said state, to which said petition was presented, having allowed the same and issued said writ, the plaintiff in error refused to comply therewith on the ground that said chapter 126 [a copy whereof is set forth on page 66 of the brief of plaintiff in error] abridges his privileges and immunities as a citizen of the United States; that it deprives him of his liberty and property without due process of law and denies to him the equal protection of the laws; that it amounts to a regulation of commerce among the states and is therefore unconstitutional and void. The plaintiff in error having made return to said writ of mandamus, the defendant in error interposed a demurrer to the return, which demurrer was argued before said district court and sustained. An appeal was then taken by plaintiff in error to the supreme court of said state, which court affirmed the judgment of said district court.

I.

The plaintiff in error, having based his refusal to comply with the writ of mandamus, upon the ground of the unconstitutionality of the law in question, it then becomes his duty to prove beyond all doubt that it is unconstitutional.

Penn. R. Co. vs. Riblet, 66 Pa., St. 164. 7 Atl. 913.

Territory vs. Van Gaskin, 6 Pac., 30.

Lunt's case, 6 Maine, 413.

It has been frequently held, and is acknowledged by all courts as the undoubted and true rule, that a statutory enactment will not be declared unconstitutional, and therefore void, unless a clear and substantial conflict exists between it and the constitution. It has been further held that every presumption is in favor of the constitutionality of legislative acts; that the case must be practically free from doubt before an act of the legislature should be declared unconstitutional;

People vs. Gillson, 109 N. Y., 389.

St. Louis County vs. Griswold, 58 Mo., 192.

The State vs. Able, 65 Mo., 357.

In passing upon the question at issue the court cannot examine into the wisdom, expediency or propriety of the legislation under which defendant in error asserts his rights herein, but must confine itself to the question as to whether or not the legislature had the power under the constitution to pass any such law.

Territory vs. Van Gaskin, 6 Pac., 30.

"It may now be considered as an established

principle of American law that the courts, in the performance of their duty to confine the legislative department within the constitutional limits of its power, cannot nullify and avoid a law, simply because it conflicts with the judicial notions of natural right or morality, or abstract justice."

Tiedman's Limitation of Police Power, p. 7.

Cearfus vs. The State, 42 Md., 403.

II.

This court is bound to presume that the Legislature acted rightly and cannot declare the act in question to be in violation of the fundamental law unless it is clearly so

Penn. R Co. vs Riblet, 66 Pa. St., 164.

Field J, in Slaughter-house case, 16 Wall, 36-87.

"Generally it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety; and while its measures are calculated, intended, convenient and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts."

In re Jacobs, 98 N. Y., 98.

III.

If the law surrounds legislative acts with the

presumption of legality and casts the burden of showing wherein such acts are opposed to the fundamental law, upon the party seeking to avoid the same, then it becomes the duty of the plaintiff in error to show to the court that his property involved herein is strictly private property, devoted to private use and not in any manner devoted by him to public use in order to escape the liability of having the same subjected to legislative control for the common good.

If plaintiff in error has so used his property as to make it of public consequence so that it affects the community at large, he has then by his own act invested the public with an interest therein which may be controlled for the common good.

The plaintiff in error has no absolute right to the property in question. He holds the same as all property is held, that is, subject to the paramount right of the people to control the same for the public good.

Beer Co. vs. Massachusetts, 97 U. S., 25-32

State of Missouri vs. Addington, 12 Mo., Appeal Reports p. 214.

Berthelf vs. O'Reilly, 74 N. Y., p. 509.

The law in question does not interfere with the title of plaintiff in error or interrupt him in the

free enjoyment of his property or transfer it against his will, but merely declares that he, having offered it for public use, shall make a reasonable charge for such use.

Defendant in error does not claim that the elevator of plaintiff in error becomes a public elevator solely by reason of said chapter 126. What he does claim is that the plaintiff has by his acts devoted the same to public use and clothed it with a public interest and the legislature of North Dakota has accentuated his declaration in that respect by section 4, of said chapter 126.

IV.

Do the facts appearing by the record show that plaintiff in error is conducting a public warehouse as defined by said section 4?

Section 4 provides that "all buildings, elevators or warehouses in this state erected and operated or which may hereafter be erected and operated by any person or persons, association, co-partnership, corporation or trust for the purpose of buying, selling, storing, shipping or handling grain for profit, are hereby declared public warehouses." * * * *

It is admitted by the record that the plaintiff

in error "is now and at all times stated has owned and operated a grain elevator at the railroad station of Grand Harbor for the purpose of buying, selling, storing and shipping grain for profit. That defendant in error is dependent almost wholly upon the grain elevators and warehouses in the vicinity of his farm for storage capacity; that fully fifty per cent. of the grain raised in this county is also dependent for storage capacity upon the grain elevators and warehouses of said county."

It further appears that he tendered wheat to plaintiff in error for storage and offered to pay the statutory price for such storage, but the latter refused to receive the same at such price.

It nowhere appears in the record that plaintiff in error refusal to store said grain was based upon the fact that his elevator was his private property. If it was his private property and he had not by his manner of conducting the same devoted it to the use of the public then he would have the right to refuse to store grain for private parties unless they paid to him the price of storage which he chose to exact.

It is a significant fact, however, in the case that the plaintiff in error did not base his refusal to

receive defendant's grain for storage on the ground that he was conducting a private business, but he placed the same upon the ground that defendant tendered to him the rate which the legislature established as a reasonable one for such service instead of the one which he chose to exact.

If the court is to take judicial notice of any fact it certainly ought to take judicial notice of the fact that these grain elevators and warehouses have been erected and conducted for the purpose and as a matter of fact for several years past have had a practical monopoly of the handling of the greater part of the wheat raised in all of the grain producing states. They have conducted their extensive business in the same manner as the plaintiff in error was conducting his when this cause of action arose.

So far as the principle involved in this case is concerned it matters but little whether the plaintiff in error owns but one small elevator, worth $3,000, or whether the same is of mammoth size and erected at a cost of twenty times the one in question.

If the legislation in question were to rest solely upon the fact that the plaintiff in error has

a virtual or practical monopoly of the business of storing wheat, we believe that the record makes out such a case of monopoly on the part of plaintiff in error and others engaged in like business.

It is an admitted fact that defendant, upon being denied the right to store his grain in the plaintiff's elevator, applied for the same purpose to the only other elevator or warehouse at Grand Harbor, and was denied the right, not because they were private warehouses, but because he would not pay them the price they arbitrarily fixed for such service.

If the owners of all grain elevators and warehouses within a radius of fifty miles of Grand Harbor, as appears by the record, refuse to store grain at the price fixed by chapter 126, it certainly is very strong evidence to indicate that a combination or monopoly exists among them to regulate for themselves a business which has grown to such immense proportions in this state that the general public are compelled of necessity to patronize it.

It is an admitted fact in this case that at the time defendant in error tendered the grain in question for storage the plaintiff in error had

empty space in his elevator which was available, and that he was willing to store the grain providing he was paid a price in excess of that fixed by the legislature.

If he had the space and was willing to accept grain for storage on any terms it tends strongly to show that he held himself out as a sort of public servant.

It also appears in the case that defendant in error did not have sufficient storage capacity on his farm or elsewhere to store the grain raised on his farm; that on being refused storage by plaintift he applied to the only other elevator in Grand Harbor for storage, but was refused upon the same ground as that advanced by plaintiff, viz: that they would not receive his grain at the legislative rate.

From the nature of the case the defendant in error was practically under moral duress to the extent of being forced to use the elevator of plaintift in error.

It is not a sufficient answer to make to one situated as was the defendan t in this case that if he had not sufficient storage capacity on his farm he could for $240 erect a granary sufficient in size to store his crop.

The question at issue does not in any wise depend upon the ability or want of it on the part of defendant to erect for himself a warehouse.

The question here is, did the plaintiff in error by his method of doing business bring himself under the provisions of said chapter 126. If he did then he was obliged under said law to accommodate the grain of defendant in his warehouse if he had sufficient room therein at the time the demand for storage was made upon him.

If the plaintiff had been conducting a business of a private nature and in which the public had no interest it is more than likely that he would have made some claim of that kind in reply to defendant's demand for storage instead of basing his refusal solely upon the inadequacy of defendant's tender of compensation.

It is a matter of common knowledge in North Dakota that the grain elevators and warehouses situated therein have had a practical monopoly of the wheat handling of the state and have fixed and maintained their own rates for storage down to the time when what counsel for plaintiff is pleased to call a Farmers Alliance legislature intervened to cut off some of their unjust

exactions.

It is an admitted fact in this case that fully fifty per cent. of the grain raised in Ramsey county, North Dakota, is dependent for storage capacity upon the grain elevators and warehouses at the various towns, villages and railroad stations in the county. It may also be said that this same state of affairs exists in every other grain producing county in the state. If this is true, the grain elevators and warehouses have practically a monopoly of one-half of the grain produced in the state, for it is a matter of common knowledge that wheat when once stored in the elevators is in a short time disposed of to the elevator owners.

If the plaintiff in error had a practical monopoly of the storing of fully fifty per cent. of the grain raised in Ramsey county, then we submit that it is just as important that legislative action should intervene to regulate his charges as if he were engaged in operating one of the fourteen elevators in Chicago whose exactions compelled legislative action in the state of Illinois. If such a large percentage of the grain raised in North Dakota was and is dependent for storage capacity upon the elevators, then it certainly must

follow that the public in a grain producing state like this ought to have some interest in the fact as to whether or not reasonable or unreasonable storage charges are exacted.

The act of the legislature in question does not by any of its provisions compel the plaintiff in error to do a storage business, but simply regulates for the public good a business which he has by his own acts devoted to the public use.

As was said by the Supreme Court of North Dakota in its opinion in this case, "The elevators and warehouses of the state have grown up as an inseparable adjunct of the farming interests of the state; they reciprocally depend upon and sustain each other; it is, in fact, difficult to conceive of a system in which the peculiar grain raising and shipping industry of this state can be successfully carried on independently and without the practical co-operation of the elevators and warehouses located at the stations. * * "Their business has a relation to the public which is peculiar to them and which lifts their business out of the common business pursuits of our people and places it in a separate class," and further our Supreme Court says: "Without further amplification, we unhesitatingly declare

and so hold that the warehouse and elevator business as conducted in this state is a 'business peculiarly affected with a public interest,' and as such is subject to legislative regulation to the extent of fixing a maximum rate of charges for storing and handling grain in the public warehouses."

These elevators by reason of the peculiar circumstances surrounding them in this state practically do stand in the very "Gateway of Commerce" and take toll from all who pass.

If "it was by the facts" in the Munn case that Chief Justice Waite held that the Illinois statute regulating the charges for storing grain was constitutional, then we maintain that Chapter 126 "is by the facts" in this case a proper exercise of legislative power.

The wheat producer "is by reason of the facts' *forced* to store his grain with the elevators, *compelled* to use them and is "necessarily restricted" to them.

The law in question is general in its operation and affects alike the rights of all engaged in the same kind of business, namely, the business of elevators and warehouses.

Plaintiff in error complains that the rules es-

tablished under the law are unjust and that the enforcement of them would hamper him in his business. Well, this may be true, but yet it does not affect the validity of the act in question.

If the rules are unjust and burdensome the plaintiff in error can have the same remedied, but this court ought not for that reason to declare the law itself invalid.

This court has, by its decisions in the now celebrated Munn and Budd cases, set at rest the question as to the right of legislative control over the business of grain elevators and warehouses to the extent of fixing the maximum rates which they may be allowed to charge.

The only question involved in this case is as to whether or not the legislature of North Dakota exceeded its constitutional powers in enacting chapter 126 above referred to. In the confident belief that the legislature did not exceed its constitutional limits, and that the facts in the case at bar as appear by the record are in line with the Munn and Budd cases, this case is respectfully submitted.

C. D. O'BRIEN,
Attorney for Defendant in Error.
St. Paul, Minn.

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OCTOBER TERM, 1893.

No. 768.

NORMAN BRASS, PLAINTIFF IN ERROR,

vs.

THE STATE OF NORTH DAKOTA, EX REL.
LOUIS W. STOESER.

Brief for Defendant in Error.

HALBERT E. PAINE,
Of Counsel for State of North Dakota.

WASHINGTON, D. C.:
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Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 768.

NORMAN BRASS, PLAINTIFF IN ERROR,

vs.

THE STATE OF NORTH DAKOTA, EX REL. LOUIS STOESER.

Brief for Defendant in Error.

On the thirtieth day of September, 1891, the state of North Dakota, on the relation of Louis W. Stoeser, petitioned the district court of the second judicial district of North Dakota for an alternative writ of mandamus, requiring Norman Brass to store the relator's grain in his elevator, at specified rates of compensation. The alternative writ was issued on the same day, and was served upon Brass, October 2, 1891. On the fifth of October, 1891, the respondent made his return to the alternative writ, admitting the truth of the facts therein pleaded, and alleging certain other facts as grounds for the dismissal of the proceeding. On the fifth of October the relator demurred to the return, on the following grounds: (1) that the facts, alleged in the return, did not constitute a defence to the cause of action set forth in the writ;

(2) that the return did not show a legal excuse for the respondent's non-compliance with the requirements of the writ; and (3) that the return showed no legal ground for withholding a peremptory writ of mandamus. The respondent electing to stand on the return and demurrer, a peremptory writ was issued October 5, 1891. The supreme court of North Dakota, at the January term, 1892, affirmed the order of the district court, sustaining the demurrer and directing the issue of the peremptory writ.

When the case was brought into this court, by writ of error, it therefore stood upon the facts established by the alternative writ, return, and demurrer. In that condition it was considered by this court, when submitted under the twentieth rule. Subsequently counsel for the state of North Dakota gave notice to this court that a motion would be presented to vacate the submission made under Rule 20; to remand the cause to the court below; and to permit the introduction of evidence, by the defendant in error, to establish certain material facts. But before the proposed motion was submitted by the state of North Dakota, this court, on its own motion, restored the cause to the docket, for hearing before a full bench. Meantime the parties to the record have filed a stipulation, setting forth certain facts not shown either in the alternative writ, or in the return.

The first question, therefore, is what course will this court, in the presence of these stipulated facts, adopt for the further consideration of the case? Will the court remand this cause to the court below, to be reformed in accordance with the facts? Or will the court regard these new facts as virtually incorporated into the writ, or into the return, and proceed to a final adjudication of the cause so modified? Or will the court exclude these stipulated facts altogether, and, without remanding it to the district court, proceed to adjudicate the cause as it stood when brought, by writ of error, into this court?

I.

Assuming, for the present, that the court may consider the propriety of remanding this cause to the court below, to be reformed in accordance with the facts, I respectfully submit that, upon the facts established by the writ, return, demurrer, stipulation, and supplemental proof, the position of the defendant in error, in this case, will be stronger than was the position of the defendant in error in Munn *v.* Illinois, 94 U. S. 113, and also stronger than was the position of the defendant in error in Budd *v.* New York, 143 U. S. 517.

The differences actually existing between the Munn and Budd cases and the case at bar are all in favor of the defendant in error.

1. The proposed proof will show that the elevator of the plaintiff in error is located on the right of way of The Great Northern Railway Company, formerly styled The St. Paul, Minneapolis and Manitoba Railway Company, and on land leased by that company to the plaintiff in error. Neither of the elevators involved in the Munn and Budd cases was located on the right of way of any railroad company, or on land leased to the elevator owner by any railroad company.

2. The proof will show that the right of way, in the case at bar, is devoted to public use, and that its use, at the place where the elevator is located, is subject to regulation by the laws of the state of North Dakota. The elevators involved in the Munn and Budd cases were not located on land dedicated to public use.

(1.) Corporations created for special purposes of intercommunication, like railway companies, and invested, by the government, with the grant of a right of way through the

public lands, have no interest or estate in land whatever, except the right to use it in the performance of the functions with which they have been invested by the state, and can neither use it, nor convey it to be used, for any other purpose.

(2) To empower a railway corporation to divert any part of its right of way from public to private use, a legislative grant, which merely confers the right of way upon the corporation, is not sufficient. The grant must be supplemented by special authority for such diversion.

(3) No such special authority has been conferred in this case. The right of way was acquired by the railway company, under the first section of the act of Congress entitled, "An act granting to railroads the right of way through the public lands of the United States," approved March 3, 1875. 18 Stat. 482. The provision is:

> "That the right of way through the public lands of the United States is hereby granted to any railway company, duly organized under the laws of any state or territory, except the District of Columbia, or by the Congress of the United States, which shall have filed, with the secretary of the interior, a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road:
>
> Also the right to take, from the public lands adjacent to the line of said road, material, earth, stone and timber necessary for the construction of said railroad:
>
> Also ground adjacent to such right for station buildings, depots, machine shops, side-tracks, turn-outs, and water-stations, not to exceed, in amount, twenty acres for each station, to the extent of one station for each ten miles of its road."

The designation of the route of the St. Paul, Minneapolis and Manitoba railway, through Ramsey County, Dakota, was filed in the interior department, August 11, 1882; and proof of the incorporation and organization of the company was completed October 25, 1890.

(4) No act of congress, or of the legislature of the territory of Dakota, or of the legislature of the state of North Dakota, has empowered this railway company to divert from public to private use its right of way or adjacent land.

It is provided in the sixth section of the act organizing the territory of Dakota:

"That the legislative power of the territory shall extend to all rightful subjects of legislation consistent with the constitution of the United States and the provisions of this act: *but no law shall be passed interfering with the primary disposal of the soil.*" 12 Stat. 241.

This statute interdicts any attempt on the part of the legislature of Dakota to change the status of the right of way in question fixed by the act of March 3, 1875. But then the legislature has never attempted to change the status of this right of way.

The provision of the general corporation law, which re appears in section 2919 of the Compiled Laws of 1887, is that:

"Every corporation, as such, has power * * * to purchase, hold, transfer and convey such real and personal property as the legitimate purposes of the corporation may require, not exceeding, in any case, any amount limited by law."

But this provision does not purport to interfere with the primary disposal of the right of way by the United States, under the land-grant act of March 3, 1875. If it did interfere therewith, it would, to the extent of such interference, be absolutely void.

A legislative enactment, which reappears as section 456 of the Revised Codes of 1877, is in the following words:

"Any rail-road corporation is authorized to pass over, occupy and enjoy all the public lands, to the extent and in the manner prescribed by the act of congress approved March 3, 1875: *Provided*, That the damages accruing to any occupant, or possessory claimant, or other person, who may reside on, or have improvements upon, said public land, shall be determined and paid by said railroad corporations, as provided in this article for owners of private lands."

It is obvious that this statute does not divert, or purport to divert, this right of way from the public use, to which it was devoted by the federal law of March 3, 1875, to private use.

The constitution of the state of North Dakota contains the following provisions:

"Art. 142. Railways heretofore constructed, or that may be hereafter constructed, in this state, are hereby declared public highways; and all rail-road, sleeping-car, telegraph, telephone and transportation companies of passengers, intelligence and freight are declared to be common carriers and subject to legislative control; and the legislative assembly shall have power to enact laws regulating and controlling the rates of charge for transportation of passengers, intelligence and freight, as such common carriers, from one point to another in this state: *Provided*, That appeal may be had to the courts of this state from the rates so fixed: but rates fixed by the legislative assembly or board of rail-road commissioners, shall remain in full force pending the decision."

"Art. 146. Any combination, between individuals, corporations, associations, or either, having for its object or effect the controlling of the price of any product of the soil, or any article of manufacture or commerce, or the cost of exchange or transportation, is prohibited and hereby declared unlawful and against public policy; and any and all franchises, heretofore granted or extended, or that may hereafter be granted or extended, in this state, whenever the owner or owners thereof violate this article, shall be deemed annulled and become void."

Certainly these constitutional provisions do not divert the right of way under consideration from public to private use.

3. The proof will show that the charges for storage, in elevators located at this point, on said right of way, are subject to regulation by the laws of North Dakota. If there can be any question as to the constitutionality of the laws regulating storage charges in the Munn and Budd cases, there can be no such question in this case.

4. It will be shown that, by the terms of the lease, the land on which the elevator is located was required "to be used for the exclusive purpose of erecting thereon a grain warehouse or elevator, for the storing and handling of grain," and the plaintiff in error was required to construct thereon "a grain warehouse and elevator of the capacity, at one time, of not less than twenty thousand bushels, with all the necessary fixtures, machinery, appliances and appurtenances, for the safe and prompt receipt, elevation and delivery, on board cars, of grain, and maintain and operate the same, during the existence of this lease, for public use, without discrimination, and so as, at

all times, to furnish all requisite facilities for the receiving, elevating, cleaning and shipment of grain, at said warehouse and elevator, in a prompt and efficient manner." There was no such lease or agreement in the Munn case, or in the Budd case.

5. It will appear that, by the terms of the lease, the plaintiff in error was bound to "enlarge said warehouse and elevator and its appliances, from time to time, when required by the said" railway company, "so as to provide for the receiving, hauling, cleaning, storing, elevating and delivery of all grain that may be offered thereat." There was nothing of this kind in the Munn case, or in the Budd case.

6. It will appear that, by the terms of the lease, the plaintiff in error was bound to "comply with all provisions of the laws of the state of North Dakota, applicable to the management and operation of elevators and warehouses therein." There was no such agreement in the Munn case, or in the Budd case.

7. It will appear that, by the laws of North Dakota, the elevator is made a public warehouse, and the plaintiff in error is forbidden to permit "discrimination with reference to the buying, receiving and handling of grain, of standard grades, or in regard to parties offering such grain for sale, storage or handling, at such public warehouse, while the same is in operation;" and it is declared that "the charges for storage and handling grain shall be not greater than the following schedule: For receiving, elevating, insuring, delivering and twenty days' storage two (2) cents per bushel." If there be a question as to the constitutionality of similar legislative provisions, in the Munn and Budd cases, there can be no such question in the case at bar.

If this cause shall be remanded to the court below, for

reformation in accordance with the facts, so that it shall be finally adjudicated upon the facts established by the writ, return, stipulation, and supplemental proofs, a judgment in favor of the defendant in error will be supported, not only by the doctrine enunciated, in the decisions of the court, in the cases of Munn *v.* Illinois and Budd *v.* New York, but also by the principles upon which the dissenting justices based their conclusions, in those cases.

The following paragraph in the opinion delivered by the dissenting Justices, in the case of Munn *v.* Illinois, indicates the grounds on which their dissent was based.

> "When Sir Matthew Hale and the sages of the law in his day spoke of property, as affected by a public interest, and ceasing, from that cause, to be *juris privati* solely, that is ceasing to be held merely in private right, they referred to property dedicated, by the owner, to public uses, or to property the use of which was granted by the government, or in connection with which special privileges were conferred. Unless the property was thus dedicated, or some right, bestowed by the government, was held with the property, either by specific grant, or by prescription of so long a time as to imply a grant originally, the property was not affected by any public interest, so as to be taken out of the category of property held in private right."

The opinion of the dissenting justices was that property ceased to be held merely in private right, (1) when it was dedicated by the owner to public use, (2) when the use of it was granted by the government, and (3) when specific privileges were conferred, by the government, in connection with the property; and they concluded that, in the case then before the court, the owner had not dedicated the property to public use, nor had the government granted the use of it to the owner, or conferred upon him any special privileges in connection with the property.

1. Now an incorporated railway company cannot acquire a right of way, cannot even exist, except by virtue of a legislative grant. Of course such a corporation cannot, without legislative authority, acquire a right of way for *private* use. Nor can such a corporation, without legislative au-

thority, by the transfer or lease of a part of its right of way, divert the part so transferred or leased from public to private uses. It follows that so much of the right of way of the Great Northern Railway Company as is occupied by the elevator of the plaintiff in error must have been acquired by virtue of a legislative grant, and must have been acquired for public use. This must be true whether the railway company acquired the right of way, so occupied, directly from the government, or purchased it from private owners. The corporation could not purchase the right of way from private owners, except by virtue of a legislative license; and the right of way so purchased would, of necessity, be dedicated to public use in the absence of legislative provision to the contrary.

2. It is obvious that many of the special privileges of the railway company were granted in connection with the right of way, and among them the privilege of locating elevators thereon.

3. And finally it is clear that the defendant in error, by acquiring the use of a part of the right of way, and erecting his elevator thereon, and availing himself of the special privileges conferred in connection therewith, dedi cated his elevator to public use.

But then the lease, introduced by the stipulation, shows that the plaintiff in error acquired the use of the site of his elevator on the right of way of the Great Northern Railway Co., by virtue of a lease from that corporation. This lease subjected the elevator to the laws of North Dakota, and, by its *express* terms, dedicated the elevator to public use. Moreover, the supplemental proofs will show that the railway company acquired this right of way, and all the special privileges connected with it, under the act granting to railroads the right of way through the public lands of the United States; and that it was, therefore, originally dedicated to public use;

and the site of the elevator would have remained devoted to public use, even if it had not been especially dedicated thereto by the terms of the lease.

The dissenting justices, in Munn *v.* Illinois, were of the opinion that property would be removed from the "category of property held in private right," by either one of the three following facts, viz: (1) that the property had been dedicated by the owner to public use, or (2) that the use of the property had been granted by the government, or (3) that special privileges had been granted by the government in connection with the property.

Now all of these three facts concur in the case at bar. The plaintiff in error has dedicated his elevator to public use. The use of the right of way, on which it stands, was granted to his lessor, the railway company, by the government. All the special privileges connected with the use of this right of way were conferred upon his lessor by the government. Furthermore, by the express terms of the lease, the plaintiff in error was bound to "comply with all provisions of the laws of the state of North Dakota applicable to the management and operation of elevators and warehouses therein."

In Budd *v.* New York three Justices dissented. They based their dissent, substantially, upon the grounds on which two Justices had dissented from the decision of the court in Munn *v.* Illinois. They said:

> "The elaborate discussions of the question, in the dissenting opinions in that case, and the present cases when under consideration in the court of appeals of the state of New York, seem to forbid anything more than a general declaration of dissent."

II.

If the court shall regard the new facts, set forth in the stipulation, as virtually incorporated into the writ or the

return and, without remanding the case to the court below, shall proceed to a final adjudication of the cause so modified, it will be found that the case of the defendant in error is weaker on one point only than it would be, if remanded to the court below and reformed in accordance with the facts. The point is this. The stipulation does not *expressly* show that the right of way in question was acquired under the "act granting to railroads the right of way through the public lands of the United Sates," and, therefore, does not *expressly* show that such right of way was originally dedicated to public use. On all other points the case of the defendant in error, as it stands on the writ, return, demurrer, and stipulation, is exactly what it would be, if the proposed supplemental proof were made. If the court shall conclude to proceed to the final adjudication of the cause upon the facts established by the writ, return, demurrer, and stipulation, I shall respectfully ask the court to consider the following propositions:

1. While it is true that the stipulation does not *expressly* show that the right of way in question was acquired under the "act granting to railroads the right of way through the public lands of the United States," and does not *expressly* show that this right of way was originally devoted to public use, it is also true that the facts established by the writ, return, demurrer, and stipulation, conclusively show that this right of way, however acquired, must have been acquired and held for public use.

2. While the fact that this right of way was originally devoted to public use is a material fact, it is not an indispensable fact, in the case of the defendant in error.

1. According to the proclamation of the president the state of North Dakota was admitted into the union November 2, 1889. This suit was commenced in October,

1891. It is therefore obvious that the right of way under consideration must have been acquired, either during the existence of the territory of Dakota, or while that territory was a part of the territory of Minnesota. And, while it was, of course, possible for the railway company to acquire the right of way by purchase from private owners, the presumption manifestly is that this right of way was acquired under the act granting to railroads the right of way through the public lands of the United States, and that as a necessary consequence the right of way was originally devoted to public use.

But suppose it to be true that the right of way, on which the elevator of the plaintiff in error stands, was acquired, not by a grant from the government, but by purchase from private owners; it is, nevertheless, also true that this right of way must have been held, not for private, but for public use. Unless authorized by statute an incorporated railway company cannot, by purchase from private owners, or otherwise, acquire a right of way for private use, nor can such a corporation, by the circuity of a lease to individuals, alter the nature of the franchise, and divert the right of way, or any part of it, from public to private use.

2. The fact that the right of way in question was originally acquired and held for public use is not indispensable to the case of the defendant in error. This fact being excluded from the record, the case of the defendant in error will still be stronger than was the case of the defendant in error in Munn *v.* Illinois, or the case of the defendant in error in Budd *v.* New York.

(1.) The stipulation shows that the site of the elevator was leased by the Great Northern Railway Co. to the plaintiff in error, and, by the terms of the lease, was required "to be used for the exclusive purpose of erecting thereon a grain warehouse or elevator, for the storing and handling

of grain," and the plaintiff in error was required to construct thereon "a grain warehouse and elevator of the capacity, at one time, *of not less than twenty thousand bushels*, with all the necessary fixtures, machinery, appliances and appurtenances, for the safe and prompt receipt, elevation and delivery, on board cars, of grain, and maintain and operate the same, during the existence of this lease, *for public use, without discrimination*, and so as, at all times, to furnish all requisite facilities for the receiving, elevating, cleaning and shipment of grain, at said warehouse and elevator, in a prompt and efficient manner."

(2.) The stipulation shows that, by the terms of the lease, the plaintiff in error was bound to "enlarge said warehouse and elevator and its appliances, from time to time, when required by the said" railway company, "so as to provide for the receiving, handling, cleaning, storing, elevating and delivery of *all grain that may be offered thereat*."

(3.) The stipulation shows that, by the terms of the lease, the plaintiff in error was bound to "comply with all provisions of the laws of the state of North Dakota, applicable to the management and operation of elevators and warehouses therein."

(4.) By the law of North Dakota this elevator is made a public warehouse, and the plaintiff in error is forbidden to permit "discrimination with reference to the buying, receiving and handling of grain, of standard grades, or in regard to parties offering such grain for sale, storage or handling, at such public warehouse, while the same is in operation."

(5.) By the law of North Dakota it is provided that "the charges for storage and handling grain shall be not greater than the following schedule: For receiving, elevating, insuring, delivering and twenty days' storage two (2) cents per bushel."

By the provisions of the lease just cited, the elevator of

the plaintiff in error was expressly subjected to the laws of the state of North Dakota regulating the use of elevators in that state. The cases of Munn *v.* Illinois and Budd *v.* New York embraced no features corresponding to these provisions of the lease, by which the plaintiff in error acquired his foothold on the right of way of the Great Northern Railway Co. If, then, it should be held by this court that the cases of Munn *v.* Illinois and Budd *v.* New York had been erroneously decided, it would nevertheless seem to be impossible, in the presence of the writ, return, demurrer and stipulation, to question the right of the defendant in error to judgment in the case at bar.

III.

But then, upon the supposition that this court may decline to remand the cause to the court below, for reformation in accordance with the facts, and may also exclude from consideration the stipulation of the parties, and may, thereupon, proceed to adjudicate the case upon the facts established by the writ, return, and demurrer, I respectfully suggest the following considerations:

Whether the judgments of this court, in the cases of Munn *v.* Illinois and Budd *v.* New York, were, or were not, erroneous, the defendant in error, in the case at bar, is entitled to judgment, even though the court decline to remand the cause to the court below, for reformation in accordance with the facts, and also decline to consider the facts established by the stipulation.

1. If any material differences exist between the case at bar and the case of Munn *v.* Illinois, or the case of Budd *v.* New York, the position of the defendant in error, in the case at bar, is stronger, on the points of difference, than was that of the defendant in error in either of the other cases.

As already stated, the dissenting justices, in those cases, held that, unless property was dedicated to public use, or was granted by the government, or carried some special privilege conferred by the government, "it could not be taken out of the category of property held in private right." But if it be true that, in the cases of Munn *v.* Illinois and Budd *v.* New York, no special privileges, connected with the elevators, had been conferred by the government, it cannot be said that no special privileges, conferred by the government, are connected with the elevator, in the case at the bar, even though the facts set forth in the stipulation be left out of view, and the case adjudicated on the residue of the record, as it now stands. In order to establish an elevator at Grand Harbor it was necessary to secure an arrangement with the railway company, whereby its cars should be placed within reach of the spouts of the elevator, either on a side-track or on the main line, and the elevator should be permitted to load or unload the cars. Now the fact that the elevator of the plaintiff in error is located on the right of way of the railroad, although stated in the stipulation, does not appear in the record outside of the stipulation. But even if it were true that the elevator, which does in fact stand on the right of way, did not stand there, but stood on private ground, it would still be true that with the use of this elevator are connected special privileges conferred by the government. Without the privilege of "spouting" grain from the elevator into the cars, the use of the elevator would be worth little or nothing.

This privilege is the outgrowth of the franchise bestowed by the government upon the railway company. It is conferred upon the elevator-owner by the government, through its creature the railway company. And this privilege is a monopoly, not only in fact but also in law. It is a monopoly enjoyed exclusively by those persons, upon whom this privilege

is conferred by the railway company, in the exercise of the franchise bestowed by the government. It is a monopoly granted to such persons as are able to secure these special privileges from the railway company, which, by the law, is made the depositary of the franchise. It is not a monopoly which any and every man, who may choose to do so, can "break." The privilege of loading and unloading cars, through the spout of the elevator, cannot be enjoyed without both the consent and co-operation of the railway company, whose power to consent and co-operate is a part of the franchise conferred by the government. The monopoly of the two Grand Harbor elevators will not be "broken" by a grant of the special privileges, which they enjoy, from the railway company to a third elevator; it will only be enlarged. The monopoly can only be broken by the railway company, the creature of the law. The railway company can only break it, by consummating the impossible arrangement of placing its cars within reach of all elevators, without regard to number or ownership, and permitting all elevators to load and unload its cars through their spouts.

In the case of Budd *v.* New York the dissenting justices said:

> "So here there are no exclusive privileges given to the elevators. They are not upon public ground."

But in the case at bar the elevator is in fact on public ground. It is true that this fact is shown only by the stipulation and accompanying lease. And yet, leaving out of consideration the stipulation and lease, we find that exclusive privileges are granted to such Grand Harbor elevators as are able to secure the necessary arrangements with the railway company; that these privileges are granted by the government, through the railway company, to the owners of the elevators.

There is evidently room for a distinction between the

case of an elevator, which is invested with the privilege of loading or unloading the cars of a railroad corporation, and the case of an elevator, which can only load and unload private vehicles, like wagons, or vessels. In the former case the elevator is invested with a special privilege, conferred by the government, through its creature the railway company, exercising the franchise bestowed upon the corporation. In the latter case the privilege of loading, or unloading, the private vehicle is not conferred directly, or indirectly, by the government, but is altogether a matter of private arrangement. The right of the government to regulate the use of the elevator, in the latter case, does not spring from the fact that its privileges are the outgrowth of a legislative grant, but only from the nature of the work performed by the elevator. In the former case the right of governmental regulation and control is based not only on the character of the business in which the elevator is used, but also on the fact that the opportunity to use the elevator, in that business, is created by the government, and is conferred upon the elevator by the government, through the railway company.

A railroad car cannot be loaded, or unloaded, by an elevator, unless the railway company shall consent thereto, and shall place the car within reach of the spout of the elevator; and the value of the elevator depends on this consent and co-operation of the railway company. The work of loading and unloading a railroad car is the joint work of the elevator-owner and the railway company. To say that the government has no right to regulate this joint work is to ignore altogether the part taken by the railway in the work. It is to exempt the railway, as well as the elevator, from governmental control. And if it can be true that the government has no right to regulate the load-

ing or unloading of a farmer's wagon, or a citizen's vessel, by means of an elevator, it cannot be true that the government is excluded from the right to regulate the loading or unloading of a railway car, which is of necessity the joint work of the railway company and the elevator owner. If the elevator-owner can deny that he himself owes allegiance to the government, when loading or unloading private vehicles, he cannot, by joining hands with the railway company, either enable the railway company to shake off its allegiance to the government, or segregate his own share of the work, so as to elude governmental control himself.

In the case of Munn *v.* Illinois, the elevator was located between the railway and the river, and the grain was transferred, from the cars to the vessels, through the elevator. The railway company co-operated with the owner of the elevator, in this work, by placing its cars within reach of the spouts of the elevator. The special privilege of unloading the cars in this way was conferred upon the owner of the elevator, by the law, through its creature the railway company. This special privilege was monopolized by those who were able to secure arrangements with the railway company, whereby its cars were placed within reach of the spouts of their elevators. It would, therefore, seem that the principles, upon which the dissent was based, in Munn's case, if accurately applied to the facts of that case, would not have necessitated a dissent.

2. The wheat, shipped to market from Grand Harbor, is carried from the wheat-field to the railway station, in wagons; is transferred from the wagons to the cars by the elevators; and is started from the railway station to market on the cars of the railway company. The wagoner may be the owner, or the owner's employé, and not a common carrier. The railway company is a common carrier. Is the elevator owner a *quasi* common carrier?

In Budd *v.* New York, this court said:

"The elevator, at Buffalo, is a link in the chain of transportation to the seaboard; and the elevator, in the harbor of New York, is a like link, in the transportation abroad by sea."

In the same case this court quoted and adopted the following language of the New York court of appeals:

"The business of elevating grain is an incident to the business of transportation, the elevators being indispensable instrumentalities in the business of the common carrier, and, in a broad sense, performing the work of carriers, being located upon, or adjacent to, the waters of the state, and transferring the cargoes of grain from the lake vessels to the canal boats, or from the canal boats to the ocean vessels."

The plaintiff in error asserts, in his brief, that the elevators, in Chicago and Buffalo, form "essential links in the lines of transportation between the wheat-fields and the seaboard."

The obvious import of these declarations of the courts and counsel is that the elevators are *quasi* common carriers.

But in Budd *v.* New York, the dissenting justices said:

"It will not do to say that the transferring of grain, through an elevator, is one step in the process of transportation; and that, therefore, they are *quasi* common carriers, discharging a public duty, and subject to public control. They are not carriers, in any proper sense of the term. They may facilitate transportation. So does the boxing and packing of goods for transportation. The engineers, firemen, brakemen and all the thousands of employés of a railroad company, are helping the business of transportation; but are they all common carriers, simply because their work tends to facilitate the business of transportation; and may the legislature regulate their wages?"

The boxing of goods, for railway transportation, would not seem to have a closer analogy to the functions of the elevator than has the sacking of wheat, for wagon transportation, to the functions of the railroad. The circumstance that the railroad stoker is not a common carrier would seem to have as slender a connection with the functions of the elevator as it has with the functions of the railway. If the fact that the railroad fireman is not a common carrier proves that the elevator company is not a common carrier, then, by parity of reasoning, it would

seem also to prove that the railway company is not a common carrier. So far as the common carrier question is concerned, there would seem to be a wide difference between a railroad company and a railroad stoker—between the transportation of merchandize, by a railway company, and the boxing of goods by a laborer, or the shovelling of coal by a stoker. The common carrier is the railway company—not its employé. The common carrier transports—does not merely box goods, or shovel coal, to "facilitate transportation."

IV.

The differences alleged to exist, between the Munn and Budd cases and the case at bar, in favor of the plaintiff in error, do not in fact exist.

The plaintiff in error asserts that great opportunities were afforded, at Chicago and Buffalo, for combinations to raise the charges for storage, and to practice extortion upon the farmers, and that no such opportunities were presented at Grand Harbor. This is a mistake. It was quite as easy for the two elevator-owners, at Grand Harbor, and the "street buyers," "track shippers" and other local buyers at that station, to combine to force up the price of storage and to force down the price of wheat, at that point, as it was for the elevator-owners, at Chicago, to combine for that purpose. The opinion that such a combination, in order to be effective *at Grand Harbor*, must have embraced all the elevator men, "street buyers," "track shippers" and other local buyers, *at all the points where the six hundred elevators and warehouses of the state are located*, is erroneous.

The plaintiff in error thinks that the elevators in Chicago and Buffalo form "essential links, in the lines of transportation between the wheat-fields and the seaboard," but the

elevators of North Dakota *do not* form "essential links, in the lines of transportation between the wheat-fields and the seaboard." This is erroneous. It is true that a part of the wheat of North Dakota is shipped by the farmers themselves, and a part is sold to local buyers and loaded upon cars at once, without storage in elevators; but all the residue of the wheat crop exported from North Dakota *must* go through these elevators and warehouses. As to this residue the North Dakota elevators are just as "essential links, in the lines of transportation between the wheat-fields and the seaboard," as are the Chicago and Buffalo elevators, in the case of the wheat passing through those ports. The principle of the case is not changed by the use of high-sounding adjectives. A "great terminal elevator," whatever that is, may be a larger "link" than a small elevator; but it is not more certainly or more clearly a "link," in the line of transportation. And if the Chicago elevator is the "terminal" of the "line of transportation" from the wheat-fields to Chicago, so also is the Grand Harbor elevator the terminal of the line of transportation from the wheat-fields to Grand Harbor.

The plaintiff in error thinks that the Chicago or Buffalo elevators may enjoy virtual monopolies, but that nothing of the kind is possible at Grand Harbor. This is also a mistake. The difference between the Chicago monopoly and the Grand Harbor monopoly is a difference in quantity, not in quality. The principle of the case is not determined by the size of the monopoly. If the Chicago elevators practically monopolize the storage of the grain stored at Chicago, so also do the Grand Harbor elevators practically monopolize the storage of the grain stored at Grand Harbor. The wheat-growers of North Dakota are able to load only a part of their product directly from their wagons into the cars. As to all the rest the elevators practically enjoy an

absolute monopoly in the business of storage, the wheat-growers being compelled to use the elevators. This is shown in the second and third paragraphs of the alternative writ, which is expressly admitted to be true by the return.

The next alleged difference between the Munn case and the case at bar is stated, in the words of the plaintiff in error, as follows:

> "The only practicable means of transferring the surplus grain product of seven great grain-producing states from the cars to the boats are fourteen elevators, controlled by nine firms. No conditions similar to the above exist in North Dakota."

It is certainly true that there are neither fourteen elevators at Grand Haven, nor nine firms controlling fourteen elevators there, and that the two Grand Haven elevators do not transfer "the surplus grain product of seven great grain-producing states from the cars to the boats." But all this is immaterial, unless there is some magic in this combination of the numbers fourteen, nine, and seven. The Grand Harbor elevators perform, for a part of one state, precisely the same service which the Chicago elevators are alleged to perform for seven states. The principle of the case is not affected by the substitution of the figure 7 for the figure 1, or by the substitution of the figure 14 for the figure 2.

The plaintiff in error alleges, as the fifth, sixth, seventh, and eighth points of difference, in his favor, between the case at bar and the other cases, that the Chicago elevators are "immense" and the North Dakota elevators small; that the Chicago elevators have a river on one side and a railway on the other, whereas the Grand Harbor elevator has not a river on one side and a railway on the other; that the wheat handled at Buffalo was transferred to canal-boats, but nothing of the kind happened at Grand Harbor; that "about 120,000,000 of bushels of grain annually came to Buffalo from the west," but that quantity does not come

to Grand Harbor. If these considerations have any weight at all, they certainly fail to establish the contention that it is unconstitutional for the legislature of North Dakota to limit the storage charges of an elevator invested by the government, through its creature, the railway company, with the special privilege of loading and unloading the railroad cars.

The plaintiff in error suggests, as the ninth difference, in his favor, between the case at bar and the other cases, that a combination existed between the elevator-owners at Buffalo for maintaining excessive storage charges; and that it was alleged in the return and admitted by the demurrer that the elevators in North Dakota "were operated independently of and in competition with each other."

But there is no averment in the indictment or complaints in the Budd case,—there is no proof in the record of that case,—that any such combination existed at Buffalo And, while it is alleged in the return of the respondent, in the case at bar, that the elevators in North Dakota "are owned and operated by different owners independently of and in competition with each other," that return also contains the following admission: "The respondent admits the truth of the facts pleaded in the alternative writ." And the alternative writ contains the following averments:

"6. That said Brass then and there refused to receive said grain for the purpose aforesaid, and wholly refused to store said grain at said price.

7. That the relator endeavored to secure storage for said grain, at the only other elevator in operation at said railroad station of Grand Harbor aforesaid: but said elevator refused to receive relator's grain upon the same ground as respondent.

8. That the relator is informed and believes that the owners of grain elevators and warehouses, within a radius of fifty miles of Grand Harbor aforesaid, refuse to receive grain for storage at said price."

The return of the respondent contains the statement:

"That, for thirteen years last past, the rate charged for the storage of grain has been uniform, at all elevators, flathouses and warehouses, in North Dakota, and, during that time, did not exceed the following schedule: For receiving, elevating, insuring, delivering and fifteen days' storage, two and one-half cents per bushel," &c.

But there is no suggestion in the record that the *farmers* of North Dakota established this rate of two and one-half cents per bushel for storage. On the contrary the presumption is that this rate was fixed by the warehouse-men and elevator-owners themselves. If it was so fixed, it was fixed by a combination of persons engaged in the business. And while the allegation of the return that the "elevators are owned and operated by different owners independently of and in competition with each other," may mean that these owners had not agreed upon a schedule of storage rates, that is not the necessary meaning of the allegation. An agreement to sell goods at a designated price does not make one merchant the dependent of another; nor does it prevent the sharpest competition in business. Taking the averments of the alternative writ and the statements and admissions of the return together, we reach the inevitable conclusion that, while it is not shown that there was a combination to maintain high rates of storage between the elevator-men at Buffalo, it is shown that there was such a combination at Grand Harbor. The two elevator-owners at Grand Harbor refused to received the relator's wheat at the rate of storage prescribed by law. Both demanded two and one-half cents per bushel. Neither refused on the ground that his elevator was not operated for the storage of grain. If the plaintiff in error was not bound to store the relator's wheat, then none of the six hundred elevators in North Dakota were bound to store any wheat; there was no station storage for wheat in North Dakota; and the farmer was wholly at the mercy of local buyers. If the plaintiff in error was not bound to store the relator's wheat for two cents per bushel, no elevator-owner in the state was bound to store it at that price.

If the owners of the two elevators at Grand Harbor could lawfully refuse to store the relator's wheat, they

could force him to sell it at such prices as should be fixed by the owners of the elevators and other local buyers. If the plaintiff in error had received the relator's wheat it would have been shipped forthwith to Minneapolis or Duluth and sold. The plaintiff in error would have had the use of the proceeds of the sale, without interest, until the return of the storage receipts—perhaps for several months—and would also have received compensation for several months' storage of wheat which had not been in fact stored for a single hour. If, then, the plaintiff in error had been permitted to insure, at the relator's cost, he would not only have had the gratuitous use of the farmer's money, and compensation for the storage of wheat never stored, but would also have received compensation for several months' insurance of wheat never insured for a day.

The plaintiff in error alleges that two other differences, favorable to his position, exist between the case at bar and the other cases, viz: that the area available for stationary elevators is limited, in Buffalo, but unlimited in North Dakota; and that the business transacted in Buffalo is much more extensive than that transacted in North Dakota. While these propositions are both true, they seem to be wholly immaterial.

The plaintiff asserts that:

"The farmer can do precisely as he pleases, so far as storing or not storing his grain in any of the various warehouses throughout the state is concerned. The proper place for a farmer to store his wheat is in his own granary until he gets ready to haul it to market."

But in the alternative writ it is stated:

"2. That the relator has not sufficient storage capacity, on his farm or elsewhere, for said grain so raised as aforesaid; but is dependent almost wholly upon the grain elevators and warehouses in the vicinity of said farm for storage capacity.

3. That fully fifty per cent. of the grain raised in said Ramsey County, North Dakota, is dependent, for storage capacity, upon the grain elevators and warehouses at the various towns, villages and railroad stations in said Ramsey County."

And in the respondent's return he says: "That the repondent admits the truth of the facts pleaded in said alternative writ."

The plaintiff in error seems not to be overwhelmed with reverence for the supreme court of the state of North Dakota. He says:

"In the opinion of the supreme court of the state, the following facts, which have no foundation in the record, are stated in an effort to bring this case within the range of the Munn and Budd cases: 'The station where the elevator is located is the only place in the vicinity, or for miles around, where the producer can find either storage or a buyer for his grain.' The answer to that statement is that, if the farmer wishes to store his grain, the proper place to store it is in his granary, where farmers from the beginning of time have stored their grain."

He also cites the following paragraph from the opinion of the supreme court of North Dakota:

"It is conceived to be important to the seller that his grain should be in hand and accessible, at the railroad station, where it can be disposed of any day, when the market is favorable, or when necessity compels a sale."

He says that:

"The first answer to that statement is that it is conceived to be equally important to a man, who has invested his fortune in a grain elevator or warehouse, for the purpose of *buying* grain, that he be allowed to conduct his business in his own way, so long as he does not infringe the rights of any other person."

This is strong language for a litigant whose elevator is invested with the special privilege of loading and unloading railroad cars, and is therefore subject to statutory regulation; who is ready to store wheat for two and one-half cents per bushel, but refuses to store it for two cents per bushel; who attempts to pervert the public use, to which the enjoyment of his special privileges subjects his elevator, to a purely private use. The plaintiff in error forgets that in his return he admitted the statement made in the alternative writ that he operates his elevator for storing as well as for buying, selling and shipping grain. He forgets that, without the consent and co-operation of the rail-

way company, the creature of the law, he cannot load a bushel of wheat upon a railway car. He forgets that he was ready to store the relator's grain at the rate of two and one-half cents per bushel, and only refused it because the rate offered was unsatisfactory.

The supreme court of North Dakota says that "The elevators and warehouses of the state have grown up as an inseparable adjunct of the farming interests of the state." The plaintiff in error says that "This statement may be answered by the statement that the dry goods and grocery stores have grown up as an inseparable adjunct of the farming interests of the state." But there is obviously very slight analogy between the regulation of the price of storage in an elevator which enjoys the franchise of loading and unloading railroad cars, and is therefore held for public use, and the regulation of the price of goods sold in a village store.

The supreme court of North Dakota, referring to the shipment of wheat, "in car-load lots," by the farmers themselves, says that "This mode of shipping grain is wholly inadequate, as a means of transporting to market the surplus grain produced in this state, when the yield is as large as it frequently has been in years past." The plaintiff in error asserts that he is "not able to understand what the court meant to express by this statement." But this court will have no difficulty in understanding what the court below meant by this statement. For in the very next paragraph that court said that small producers "more frequently than otherwise would be unable to hold a box-car, at a station, long enough to enable them to haul their grain from a distance to fill such car." The demurrage on the car would swallow up nearly half the proceeds of the grain.

The supreme court of North Dakota says that "It would be impossible to market the larger part of the surplus grain

raised in this state, in any year of an average yield of wheat and other cereals, without the aid of elevators and warehouses now standing at railroad stations and placed there for the express purpose of receiving, grading, and storing the grain, and delivering it upon the cars." The plaintiff in error asserts that this statement of the court below "can have no weight in this court," because the purpose for which these warehouses and elevators were constructed and for which they are being operated was not to *store* grain of third persons, but to *buy* grain." He asserts that he has constructed and operated his elevator for the sole purpose of buying and selling grain, and cannot be compelled to *store* the grain of other persons. But the record shows that he constructed it, and has largely operated it, for storing the grain of other persons. It is stated in the alternative writ and admitted in the respondent's return—

"4. That the respondent Norman Brass is now and at all times herein stated has owned and operated a grain elevator, at the railroad station of Grand Harbor aforesaid, for the purpose of buying, selling, storing and shipping of grain *for profit*."

His elevator is invested with special privileges by the government, and is, therefore, devoted to public use. If the plaintiff is attempting to appropriate it exclusively to his own private use, his course is illegal. It is manifestly his duty either to obey the law or to vacate the premises.

The supreme court of North Dakota says that the elevators "have such a large and decisive work to do, in the matter of transferring grain from the hands of the producer to the common carrier and to the buyer, that their business has a relation to the public which is peculiar to them, and which lifts such business out of the common business pursuits of our people and places it in a separate class." In answer to this the plaintiff in error asserts that "The elevators and warehouses of North Dakota have nothing whatever to do with transferring grain to the buyer;—the grain product

of North Dakota is delivered to the buyer, at Minneapolis and Duluth, by the railroads." That is to say: when the wheat is transferred from the wheat-field to the railway station, by the wagon; from the wagon to the car, by the elevator; and from the elevator to market, by the railroad, neither the wagon nor the elevator performs any function in the transfer. The mere statement of this argument sufficiently discloses its absurdity.

V.

I respectfully submit that the duties of the plaintiff in error not only were those of a common carrier, but were actually part and parcel of the duties pertaining to the railway company, as a common carrier, transferred to and assumed by the plaintiff in error. In a grain-producing country, a grain elevator, capable of loading or unloading cars through its spouts, is indispensable to the equipment of a railway company as a common carrier. If a railway company cannot, as a common carrier, discharge its obligations to the public without stations for passengers, or depots for general freight, so can it not discharge its obligations to the public in a grain-producing locality without elevators for loading or unloading grain. Indeed the grain elevator is a part, and an essential part, of the general freight depot.

The operation of the elevator, by the railway company, is subject to regulation by law. If the railway company, instead of operating the elevator itself, shall see fit to transfer to individuals the duties pertaining thereto, the individuals cannot assume them and, at the same time, shake off the character which attaches to them as functions of the common carrier. If the exercise of these functions, by the railway company, is subject to regulation by law, so also is their exercise by transferees subject to regulation by law.

The Great Northern Railway Company has seen fit to make a transfer of these functions to its lessee, the plaintiff in error. The plaintiff in error necessarily assumed them clothed with the character with which they would have been invested, if exercised by the railway company itself. Their exercise by the plaintiff in error was therefore subject to regulation by law. The railway company, being a common carrier, cannot repudiate its obligation to the public to maintain a proper equipment of its road; nor can it cancel that obligation by the device of a transfer to the plaintiff in error; nor can the plaintiff in error avail himself of the transfer, without assuming the obligation.

VI.

Even if this court shall exclude from consideration all points of difference between the case at bar and the cases of Munn and Budd, it will be necessary for the court either to override those cases, or to render judgment in favor of the defendant in error. But those cases cannot be overriden without a palpable violation of a rule which has beeen repeatedly announced by this court. This rule is that state laws are not to be set aside, as repugnant to the federal constitution, in doubtful, but only in clear cases. The judgment, in Munn *v.* Illinois, was rendered with but two dissenting voices. In Budd *v.* New York only three justices dissented. The decision in Munn *v.* Illinois has been approved five times in this court, and seventeen times by the supreme courts of different states, as shown in the opinion of the court in Budd *v.* New York. A state law, held to be constitutional by such an overwhelming preponderance of judicial opinion, cannot, in any just sense, be said to be clearly unconstitutional.

HALBERT E. PAINE,
Of Counsel for the State of North Dakota.

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153-391 IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

NORMAN BRASS,
PLAINTIFF IN ERROR,
vs.
THE STATE OF NORTH DAKOTA
EX REL. LOUIS W. STOESER.

No. 768.

Reply Brief for Plaintiff in Error.

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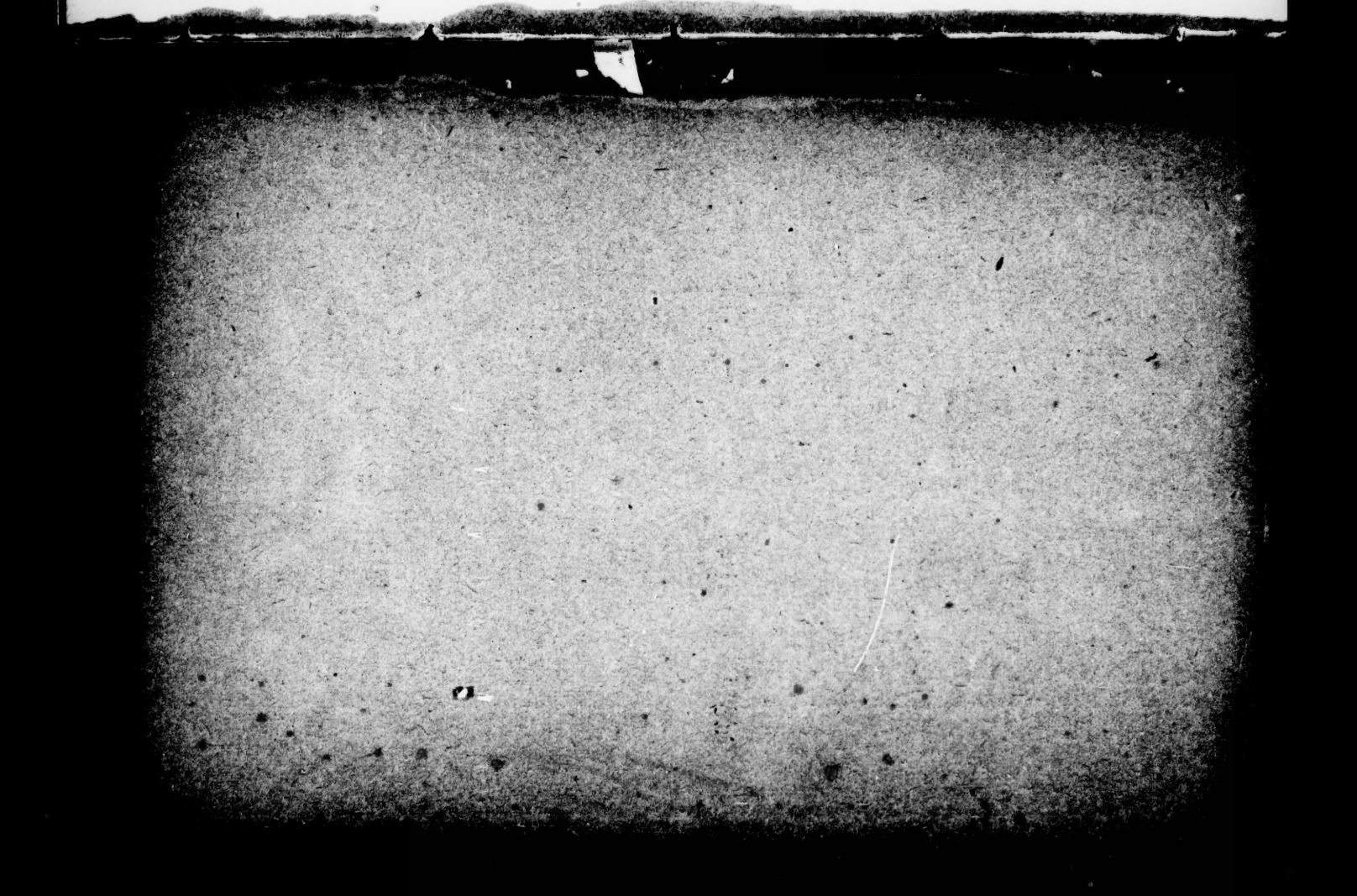

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No. 768.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

I.

It is submitted that this case cannot be remanded for assumed reformation in accordance with new facts for the first time alleged in this Court. The parties hereto had full opportunity to present all possible facts in the trial Court. Upon the record thus made by them, that Court and the Supreme Court of the State have rendered judgment. The correctness thereof is before this Court for review, and the case would therefore seem to fall fully

within the rule announced in *Railway Company* v. *Alling* (99 U. S. 463, 473):

"That our present duty is limited to a determination "of the rights of the parties as they existed when the "final decrees were rendered, and as they are manifested "in the records before us."

II.

By formal stipulation filed in this Court, it is conceded that the warehouse of the plaintiff in error is situated upon the right of way of the Great Northern Railroad, under a lease between said Company and this plaintiff in error, of which substantial copy is submitted with the stipulation. So far as the action of parties can give the Court jurisdiction it is, therefore, wholly within the pleasure of the Court to consider as part of the record herein the facts established by this stipulation and lease. For all practical purposes, the same, if considered herein, fully present all material facts which could possibly be added to the record. As the plaintiff in error has nothing to suppress with respect to the facts, we are entirely ready to meet the argument on behalf of the State upon the basis thereof. At the same time it should be distinctly understood that many of the 600 grain warehouses and elevators in the State of North Dakota, which are affected by the legislation here involved, are *not* located upon the right of way of any railroad, but upon private ground. We do not conceive that this difference in fact is, however, at all material, for this record shows that the warehouse or elevator of the plaintiff in error was built by his private means, is maintained for his use in the buying and storing of grain, and if the legislation of the State of North Dakota, in declaring his property devoted

to a public use and in regulating the price to be charged therefor, is a Constitutional exercise of power, it may be freely admitted that such legislation affects all such warehouses or grain elevators, whether they stand upon the railroad right of way or elsewhere.

III.

The affidavit of the Attorney-General of the State, to which the lease between the railroad company and the plaintiff in error is attached, as an exhibit, is not admitted to this record by the stipulation on file. Its statements are not material, inasmuch as all its general averments have no possible relation to the plaintiff in error, and the legal effect of his lease with the railroad company can be fully determined by the substantial copy thereof which is admitted to consideration here by the stipulation.

IV.

It is not admitted, however, that the right of way of the railroad company, on which this warehouse is situated, was acquired under the Federal right-of-way act of March 3, 1875. Whether it was so acquired or by purchase or condemnation from private ownership does not appear, and is not, in our view, at all material. It may be freely admitted that the railroad company, as a *quasi* public corporation, acquires and holds its right of way for the paramount purpose for which the corporation was created and the road constructed. We do not, however, concede the assumption of opposing counsel that it is the duty of the railroad corporation to construct and maintain grain warehouses and elevators, or that hence that duty has been here performed through the agency of

the plaintiff in error. Neither at common law nor under any statute of North Dakota is such duty imposed upon the railroad company. Express provisions of the statute law of that State prescribe what conveniences shall be furnished by the railroad company with respect to the shipment of grain, and negative any such assumption. Hence the extended argument of counsel on this head needs no further reply.

V.

The assumption that because the warehouse of the plaintiff in error is located upon the railroad right of way, it *hence* becomes a public structure, over which the State Legislature has complete control in regulating its use and the rates to be charged therefor, is plainly fallacious. In North Dakota, and elsewhere, such right of way is often occupied by lumber-yards, coal-yards, general stores, eating houses, and numerous other branches of commerce and industry. The resulting logic of counsel's contention would be that because such industries are located upon the railroad right of way they become devoted to the public use, and are hence subject to legislative control. This is a manifest absurdity. The railroad company may permit improper occupation of its right of way for purposes which are in no sense public, or have no direct relation to railroad transportation, and yet which afford the highest convenience to the community. Such occupation may be subject to correction at the complaint of the proper party, but cannot stamp the lumber-yard or the eating-house with a public use, or authorize the Legislature to regulate the price charged for such commodities. The learned argument of counsel on this head therefore expends its force without reaching any substantial result.

VI.

The further assumption that the lease between the railroad company and this plaintiff in error, under which the latter took the right to erect his warehouse *per se*, declares same to be a public structure or devoted to the public use, is not tenable. The plain language of this instrument in that respect shows that it was the intention of the parties to provide a building for the accommodation of the public "at fair and reasonable rates, * * * "and so as to give no just ground of complaint to any one "doing or requiring to do business thereat." This clause of the lease must be read in its entirety. So read it demonstrates that this structure was to be built at the expense of the plaintiff in error and maintained for his primary benefit and for the use of customers resorting thereto at reasonable rates and charges, which the plaintiff in error should ask for such use of his property. The succeeding clause of the lease, whereby the plaintiff in error covenants to comply with all provisions of law "ap- "plicable to the management and operation of elevators "and grain warehouses," in no manner subordinates his power to prescribe reasonable rates as *within the contemplation of the parties to the lease*. Such covenant to conform to the laws of the State can have no such operation. If in fact or law the State has power to so control the property of this plaintiff in error, the inclusion or the exclusion of such covenant in the lease was and is wholly immaterial.

But we strenuously deny that either in expression or intent this lease recognizes such right of State control with respect to the charges to be made for the services contemplated, or anticipates a subjection of the private property of the plaintiff in error to such control,

or in any manner binds the lessee to submission thereto. Our broad contention is that the lease cannot be tortured into a binding covenant on the part of this plaintiff in error to observe any and all laws which the State may choose to enact in assumed exercise of a power which has no Constitutional existence. If the assumption *contra* were admitted, then the plaintiff in error would be bound by any law which the State might enact, resulting in the enforced destruction of his property or the use thereof. The proposition, if admitted, would stand without limitation. The law of the State might require him to apply the torch to his building, and yet, upon the theory here urged against us, the covenant of his lease would so effectually bind him that he could not resist compliance with such requirement! The instrument must be read in the light of reason. All that it attempted to do was to require the plaintiff in error to treat his customers without discrimination, and impose reasonable charges for the use of his property, and to obey the laws of the State in all other respects, provided such laws were within the exercise of Constitutional power. It is too plain to require discussion that no man can be bound by the execution of such an instrument to obey every statute, whether Constitutional or otherwise. The argument *contra* simply begs the question, and assumes that by signing such an instrument this plaintiff in error stands helpless in resisting any legislative enactment, whether Constitutional or otherwise.

VII.

The further contention that the privilege enjoyed by the plaintiff in error of "spouting" grain from his elevator (whether located upon the railroad right of way or on

private ground) was a special privilege conferred by the State, and is hence a monopoly, is not true either in law or in fact. The statute of the State approved March 6, 1885 (see pages 51, 52 of original brief for plaintiff in error), requires all railroad companies to furnish cars and permit the same to be loaded with grain "either on its tracks adjacent to its depot, or at any ware-"house or side-track, without distinction, discrimination, "or favor, between one shipper and another, and without "discrimination or distinction as to the manner in which "such grain is offered for transportation, or as to the "person, warehouse, elevator, or other place, where or "to which it may be consigned. Every railroad company "shall permit connections to be made and maintained in "a reasonable manner with its tracks, to and from any "warehouse, elevator, or mill, adjacent to any station on "its line, without reference to its size or capacity, where "grain or flour is or may be stored."

The amendatory Act of March 8, 1889 (see pages 53–56 original brief for plaintiff in error), repeats in section 6 the foregoing requirements. Under such broad provisions the possibility of a monopoly cannot even be suggested. The statute does not vest any discretion in the railroad company, and the argument of counsel based upon that assumption is wholly without force. The law of the State is unlimited as to the number of such structures which the railroad company must serve, and wholly without restraint as to the number of individuals who may engage in such business. The express provision of the statute is that this privilege must be given to every such structure "without reference to its size or capacity," and hence the field of competition in this direction is as broad as the opportunity for conducting any commercial or mercantile business. Under such conditions, the suggestion of a possible monopoly is wholly without foundation.

VIII.

The vital contention here is that the facts disclosed by this record, even with the added stipulation, present a case wholly different from the facts involved in either *Munn* v. *Illinois* (94 U. S. 113) or *Budd* v. *New York* (143 U. S. 517). The binding force of these decisions is not here challenged with respect to cases presenting similar facts, or falling clearly within the principles therein announced. It is against the *extension* of the principle of these decisions to the facts disclosed by this record that the argument is here addressed. It is confidently asserted that the facts of this record negative the possible application of those decisions hereto and, on the contrary, establish conditions which forbid the attempted extension of the principles of those decided cases to the one at bar.

It is well understood that the Court will not declare the legislation unconstitutional unless compelled so to do. But the doubt which thus favors recognition of statutory law has its necessary limitation and must disappear when the conflict between the fundamental law and the statute is disclosed by the facts to be wholly irreconcilable. Does this record present such a case? The statute of the State here under review plainly declares all such structures as that owned and operated by this plaintiff in error to be public warehouses, and imposes maximum charges for the business done thereat. The reasonableness or unreasonableness of the rates thus imposed is not here involved. The power of the State to thus stamp private property with a public use is broadly denied, and is the question for determination. The plaintiff in error asserts that the statute contravenes the fundamental law, and by his return to the writ avers that he refuses to

comply with the statute "on the ground that it abridges "his privileges and immunities as a citizen of the United "States; that it deprives him of his liberty and property "without due process of law, and denies to him the equal "protection of the laws, and amounts to a regulation of "commerce among the States" (Rec. 6).

The issue is thus sharply defined. The validity of the statute upon the one hand, or the validity of this defence upon the other, is the primary matter for determination here.

It is manifest that the statute cannot stand unless it be held to fall within the principle announced by the former decisions of this Court in *Munn* v. *Illinois* and *Budd* v. *New York*, *supra*.

In order to apply these decisions to the case at bar it must first be ascertained with certainty precisely what they do decide, and the stated grounds on which the conclusions of the Court are based.

In *Munn* v. *Illinois* (94 U. S. 113) the power of the State to thus control the elevators there involved was predicated primarily upon the rules of the common law, as drawn from the writings of Lord Hale and the subsequent English cases of cognate force. The opinion cites at length from this original source of authority, and the language therein quoted all has distinct and exclusive reference to cases where the individual or corporation enjoys a *monopoly* to which the public are forced to pay tribute, and to which they must resort. Both Lord Hale and the English judges in the cases cited in terms thus treat the subject. Thus Lord Hale declares the principle applicable to a public wharf, "to which all persons that "come to that port *must come*," and Lord Ellenborough applies the principle to a case where there existed "a vir-"tual monopoly of the warehousing for these parties.

* * * "And in the same case Le Blanc, J., describes the principle as thus applied, because the exclusive privilege given by the Act of Parliament therein involved was a "monopoly." Drawing from these original sources of authority, the opinion in *Mudd* v. *Illinois* (p. 130) distinctly states the facts disclosed by the record of that case as showing that the elevators, whose rates were sought to be regulated by the statute of Illinois, were so situated, in control of the transportation and handling of all grain passing through Chicago eastward, as to give to the owners of such elevators (p. 131) a "virtual monopoly." The opinion asserts (p. 132) "They stand, to use again the "language of their counsel, in the very 'gateway of com-"'merce,' and take toll from all who pass." *Hence* the opinion expressly applied the doctrine of Lord Hale, *supra*, that because of this exclusive privilege, and because the whole public was interested therein, the business of elevating grain at Chicago had become affected with a public interest and was a virtual monopoly. On that distinct ground the power of the State to regulate the charges for the use of the elevators was sustained.

In *Budd* v. *New York* (143 U. S. 517) the validity of the statute of that State imposing maximum charges upon the elevating and delivery of grain at Buffalo from the boats to the canal, and in the port of New York from the canal boat to the elevators or ocean vessels, was sustained upon the direct authority of *Munn* v. *Illinois* and the principles of law therein declared. After reciting at length the facts shown by the record with respect to the exclusive method of handling the grain both at Buffalo and at New York by such elevators, the Court states the conclusion from such facts (p. 545 of the opinion) thus:

"Not only is the business of elevating grain affected with "a public interest, but the records show that it is an

"'*actual monopoly*, besides being incident to the business " of transportation and to that of a common carrier, and " thus of a *quasi* public character."

This brief analysis of the express grounds on which the desision of this Court in the two cases cited is based demonstrates that they stand wholly upon the finding of facts; that the business sought to be regulated by the statute involved in each case was, and is, a " virtual monopoly " as described in the *Munn* case, and an " actual monopoly " as described in the *Budd* case.

There is no distinction between the terms as thus used, nor can it be said that either a " virtual " monopoly or an " actual " monopoly differs in fact or in legal effect from a " monopoly " pure and simple.

The term monopoly is defined by Blackstone (Book IV, p. 159), thus:

" Monopolies are much the same offence in other " branches of trade that engrossing is in provisions; being " a license or privilege allowed by the King for the sole " buying or selling, making, working or using of anything " whatsoever; whereby the subject in general is restrained " from that liberty of manufacturing or trading which he " had before."

And Mr. Justice Story, in his opinion in *Charles River Bridge* v. *Warren Bridge* (11 Pet. 607), defines the term thus:

" But what is a monopoly, as understood in law? It is " an exclusive right granted to a few of something which " was before of common right. Thus, a privilege granted " by the King for the sole buying, selling, making, work- " ing or using a thing, whereby the subject in general is " restrained from that liberty of manufacturing or trading " which before he had, is a monopoly. 4 *Black. Comm.* " 159; *Bac. Abridg., Prerogative, F.* 4."

This definition is by analogy of certain application to the term as used by this Court in *Munn* v. *Illinois* and *Budd* v. *New York*, in this, that the privilege is enjoyed by a few and the public is compelled to use the privilege thus resting in private ownership.

And the popular understanding of the grounds on which this Court predicated its conclusions in *Munn* v. *Illinois* and *Budd* v. *New York* is strikingly illustrated in the definition of the term "*virtual monopoly*," as given by the learned compilers of the Century Dictionary, under the title *Monopoly* (vol. 4), thus:

"*Virtual Monopoly*, a term in constitutional law and "the history of legislation (the appropriate applications "of which have been much contested) used to characterize "a business which, though not declared by law to be a "monopoly or exclusive franchise protected as such, as "by a patent or exclusive charter, is yet so related to the "great channels and currents of commerce that the allow-"ing of it to enjoy the same protection as other private "property and business, secures to it indirectly exclusive "advantages substantially equivalent to a legal monopoly. "Thus the great grain elevators of modern commerce, "although erected as private property on private lands, "if by their situation they have exclusive advantages for "the transfer of grain from vessels at the wharf to the "railroad terminus of a trunk line, are said to constitute "a *virtual monopoly*, because if not subjected to a legisla-"tive power to restrict their charges such as other private "property and business are not subjected to, they might "be conducted in a manner oppressive to commerce."

The popular understanding of these decisions, and the grounds on which they are rested, as disclosed by the above quotation, stands in entire harmony with the judicial interpretation thereof.

Thus, in *Zanesville* v. *Gas Light Company* (47 Ohio

State, 1) the Court, at page 32, in commenting upon the decision of this Court in *Munn* v. *Illinois*, observes: "The "ground of the decision sustaining the validity of the act "is that they had devoted their property to a public use "and enjoyed a *virtual monopoly* of the business at that "point."

In *Nash* v. *Page* (80 Kentucky, 539) the decision of this Court in *Munn* v. *Illinois* is cited in support of the Court's ruling with respect to tobacco warehouses in the city of Louisville, and the Court therein observes (p. 549), in applying the same principle to the case there decided, that—

"These warehouses are invested with a monopoly of a "public privilege and made so as a matter of necessity, "and *this* authorizes the exercise of legislative power over "them for the public welfare. * * * The producer "of tobacco is restricted necessarily to these warehouses "in order to have it sold and to obtain the best market "price by competition in bidding."

In *Webster Telephone* case (17 Nebraska, 126) the decision of this Court in *Munn* v. *Illinois* was cited by the Court as sustaining its decision, holding a telephone company compelled to supply all alike without discrimination; the Court observing upon the analogy of *Munn* v. *Illinois*:

"While there is no law giving it a monopoly of the busi- "ness in the territory covered by its wires, yet it must be "apparent to all that the mere fact of this territory being "covered by the 'plant' of respondent, from the very na- "ture and character of its business, gives it a monopoly "of the business which it transacts. No two companies "will try to cover this same territory."

In his opinion in the Sinking Fund case (99 U. S. 747),

Mr. Justice Bradley stated his interpretation of what this Court decided in *Munn* v. *Illinois*, thus:

"The inquiry there was as to the extent of the police "power in cases where the public interest is affected; and "we held that when an employment or business becomes "a matter of such public interest and importance as to "create a common charge or burden upon the citizen; in "other words, when it *becomes a practical monopoly* to "which the citizen is compelled to resort and by means "of which a tribute can be exacted from the community, "it is subject to regulation by the legislative power."

The Supreme Court of New York in rendering its decision in the *Budd* case (117 N. Y. 1), after quoting the foregoing extract from the opinion of Mr. Justice Bradley in the Sinking Fund cases, adds its definition of this Court's decision in the Munn case thus (p. 16):

"The elevators in Chicago had no legal monopoly in "the business of elevating grain; the business was open "to all comers, but the location of the elevators; the con- "nection with the railroads on which most of the grain "from the grain-producing States and Territories of the "West and Northwest was brought to Chicago; the neces- "sity of using them in the transfer, storage, and transship- "ment of grain, create, as was held by the Court, a *virtual* "*and practical monopoly* which affected the business and "property with a public interest and subjected them to "regulation by law."

It is therefore plain that the decisions of this Court in *Munn* v. *Illinois* and *Budd* v. *New York* were based upon the principle that the existence and enjoyment of a monopoly, whether "virtual" or "actual," was the foundation stone on which rested the power of State control. Such is the express language of these decisions; such is their interpretation by the Courts, and such is the popular un-

derstanding thereof as conveyed by the citations *supra*. It is respectfully submitted that on this ground alone can the principle thus announced be planted. Whether the power of legislative control under such circumstances springs from the police power vested in the State or otherwise, it is submitted that in the last analysis the limit of such control reaches high-water mark at this point. In the cases decided by this Court, as well as the one at bar, it is stated that the business thus sought to be regulated was conducted by private individuals, and with private capital. The *nature* of the business, as affected by the situation of the parties, whereby they controlled the handling of grain, furnish alike in law and in reason the sole ground for legislative control. Private business for private gain is exempt from such legislative control except in particular instances where the nature thereof, or the rights of the public, necessarily stamp it with a *quasi* public character. It may, therefore, be well assumed that the general principle which denies the power of legislative control over private business and private capital cannot be set aside unless the necessity therefor plainly overrides the strength of the application of the general rule. In other words, the law will *a priori* assume that a private business, conducted with private capital, and for private gain, is subject to the general principle of non-interference from the Government. The exception to this broad rule must rest in every case upon the proven facts which establish that public interest and *quasi* public right which, by reason of the monopoly which the business enjoys, must be made subject to such legislative control for the necessary protection of the people.

In this respect the case at bar falls far without the force of the authorities which are cited by the decision of this Court in *Budd* v. *New York*, as supporting the

conclusion announced by that decision. The opinion of the dissenting Justices in that case denies the application of the principle applied, except where the monopoly thus created proceeds from an express or implied grant of power from the sovereign, without which the business in hand could not be conducted. The strength of that proposition as therein discussed cannot be enhanced by repetition here; but a short review of the cases cited in the decision of the Court to sustain its conclusion will demonstrate the sharp line of distinction which exists between authority exercised under direct or implied legislative grant upon the one hand and the transactions of private business by private capital in lines which require no distinct grant of power from the sovereign and no express or implied license to make them lawful.

Thus, among the cases cited in the decision in *Budd* v. *New York* by this Court, the following fully illustrate our contention:

In *Railway* v. *Railway* (30 Ohio St. 604) there was involved the right of a railway company to cross the track of another existing road, and presented the question of the power to superimpose by condemnation a new use upon a prior existing use. As the right of both roads rested in legislative grant and power, it was held that by the law of the State such right of crossing was recognized.

In *State* v. *Gas Co.* (34 Ohio, 572) the question involved was stated by the Court to be:

> "Whether the defendant in regard to its right to charge "for gas meters is subject to the Act entitled 'An Act "'for the Inspection of Gas Meters, the Protection of Gas "'Consumers, and the Protection and Regulation of Gas "'Companies,' as amended March 9, 1867, S. S. 160."

It appeared therein that the gas company was specially

chartered in 1864, without power of alteration or amendment of its charter reserved, and it thereby took in terms the exclusive privilege of supplying the city of Columbus and its inhabitants with gas for the purpose of affording lights for the term of twenty years.

In *Zanesville* v. *Gas Light Company* (47 Ohio St.) the question arose as to the power to control the price of gas under a charter which originally failed to reserve such power. The Court observed (p. 33):

"It is true that the public has not the use of a gas "company as it has of a ferry, nor probably as it has of "a warehouse, yet a gas company controls and supplies "a public want in a position that gives it, or may do so, "a virtual monopoly of the supply; and so far as the pub- "lic is concerned it is immaterial whether the manner in "which the want is supplied is termed a *letting* or a *sale* "of property or services. *It is the virtual monopoly of "the supply of the want that gives to the public the right "to regulate the price demanded for it* (*Abnutt* v. *Inglis*, "12 East. 527)."

In *Girard Storage Co.* v. *Southwark Co.* (105 Penn St. 248) it was claimed that the property of the elevator company was exempt from attachment and judgment because being of a public nature. In ruling *contra* the Court simply states the principle decided by this Court in *Munn* v. *Illinois*, and, after declaring that it cannot affect the matter in hand, adds:

"But it certainly does not follow that because of this "public interest the property of a private person is made "public property or even *quasi* public property, or that it "is therefore exempt from ordinary execution process."

And the telephone cases from the Nebraska and Maryland courts, in holding a telephone company subject to

legislative control, assimilated them to the telegraph and other public vehicles of intelligence, and to the duties and functions performed by a railroad company as a common carrier. The power of regulation, with respect to telephone companies, therefore stands upon ground wholly different from that presented in the case at bar, and in fact necessarily rests upon a grant of sovereign power to perform its public functions; to use the streets and public highways for its wires, and in short existing as a creature of legislative favor and under direct legislative grant of power.

Hence, in no possible view can it be said that this plaintiff in error is subject to such legislative control, unless it be that the facts shown by this record establish such monopoly as was found to exist in *Munn* v. *Illinois* and *Budd* v. *New York*, and on which finding this Court rested its decisions.

What are the facts in this respect as shown by this record? The petition of the relator (Rec. 1) avers —

"That the relator has not sufficient storage capacity on "his farm or elsewhere for said grain so raised as afore- "said, but is dependent *almost* wholly upon the grain ele- "vators and warehouses in the vicinity of said farm for "storage capacity.

"That fully fifty per cent. of the grain raised in Ramsey "county, North Dakota, is dependent for storage capacity "upon the grain elevators and warehouses at the various "towns, villages, and railroad stations in said Ramsey "county."

The return admits the facts stated by the petition (Rec. 5), but the fact pertinent to the relator's case and upon his own averment is not that he is entirely, but "*almost*" dependent upon the grain elevators and warehouses for storage of his grain.

The return discloses four separate and distinct methods whereby the relator may handle and dispose of his grain. They are fully set forth in the original brief for the plaintiff in error. Their full discussion there is given by counsel entirely familiar with the details of handling and disposing of grain in that region of country, and his discussion on this head merits the full confidence of the Court. They may be summarized thus:

A.

That at slight cost the relator could erect his own granary upon his farm (Rec. 7).

B.

That swarms of agents representing grain commission houses in Minneapolis and Duluth go through the State from town to town and from farm to farm, purchasing the grain from farmers or soliciting them to ship their grain to such houses to be sold on commission (Rec. 6.)

Hence the producer may sell his grain upon his farm or ship on board cars to these commission houses without using the local elevators or warehouses.

C.

That by existing laws of North Dakota stringent requirements are imposed upon the railroads to supply cars for this grain transportation; to afford detailed conveniences therefor; to construct platforms at any point directed by the State Railroad Commissioners, and to distribute cars for this purpose as such Commissioners may direct. These Acts are fully discussed in the original brief

for plaintiff in error, and are printed in full as an appendix thereto.

D.

These alternative available methods for disposing of the producer's grain fully negative the possible existence of a monopoly, whether "virtual" or "actual," on the part of owners of grain warehouses or elevators in North Dakota. It is manifest that if such structures did not exist the wheat crop of the State would be stored or sold upon the farms or shipped by the farmers on board of cars, consigned to their chosen place of destination for sale. The practical effect of the State legislation giving direct facilities for shipment to the farmers is stated by the return to be (Rec. 7) that "the amount of grain shipped direct "by farmers without the intervention of elevators, ware-"houses, or flathouses has been increasing, and in 1890, "as respondent is informed and believes, nearly fifty per "cent. of the entire grain product of North Dakota was "shipped to Minneapolis and Duluth, Minnesota, by "farmers; that the amount of grain shipped in that man-"ner is steadily increasing from year to year."

The rules prescribed by the State Railroad Commissioners for furnishing grain shippers with cars are set forth in the return (Rec., pp. 7, 8).

Inspection thereof and of the Commissioners stated report of actual operations thereunder will disclose that with demand for cars exceeding supply in the grain-moving season, "The liberal policy of the railroads in the "distribution of cars adopted this year has been of great "benefit to the farmers of North Dakota" (Rec., p. 8).

In the face of these record facts it is impossible to declare that the case at bar is in any manner controlled by the decisions of this Court in *Munn* v. *Illinois*, or *Budd*

v. *New York*, or by the declared principle on which those decisions rest. The existence of a monopoly controlling the *entire* grain shipment through Chicago, or through Buffalo or New York city, finds no possible parallel here. The facts do not approach even most distant similitude. In the Munn case it was declared (94 U. S. 132) that the elevators there involved—

"Stand, to use again the language of their counsel, in "the very 'gateway of commerce,' and take toll from all "who pass."

In the Budd case (143 U. S. 533) it was said of the elevators there involved "that by their means the trans- "portation of grain by water from the upper lakes to the "seaboard is rendered possible * * * " and (p. 545) that "the records show that it is an *actual monopoly* * * *."

In the case at bar the admitted facts show *three* distinct methods open to the farmers of North Dakota for the storage, shipment, delivery, and sale of their wheat, *all independent of any resort to or use of these local elevators or warehouses.* In seasons of light yield, peradventure these elevators or warehouses may not be used at all, and all revenue from the capital invested therein with respect to storing and elevating grain may be entirely lost. Their use is admittedly discretionary with the producer, and is year by year constantly decreasing. Upon such a record it is confidently submitted the principle which controlled the decisions of this Court in *Munn* v. *Illinois* and *Budd* v. *New York* has no possible application. The existence of the necessity on the part of the public, and the concurrent *monopoly* enjoyed by the owners of the elevators involved in those cases alone gave the right of State control. The necessity and the monopoly being non-existing here, the correlative power of State control is

likewise non-existing. That is the ultimate of all discussion upon the question. It is the demonstration of mathematics.

IX.

The contention that while the elevators at Chicago and Buffalo, controlling the entire grain traffic, and controlled by a few firms, could combine and maintain prices, it was quite as easy for the two elevator-owners at Grand Harbor, with the "street buyers," the "track buyers," and other local buyers at that station, to combine and force up the price of storage and to force down the price of wheat, merits no serious answer. Anything is possible, but it is submitted that the suggested combination at Grand Harbor is in the highest degree improbable. The wheat buyer naturally desires to obtain the wheat at the lowest possible price for competition in the distant markets, and it cannot be assumed that he voluntarily enters a combination to increase storage prices at the point of shipment, and thereby increase the cost of grain at the point of origin.

Nor does the presumption obtain, as suggested by opposing counsel, that the former rate for elevator charges ($2\frac{1}{2}$ cents per bushel, as against the subsequent statutory rate of 2 cents per bushel) was arbitrarily fixed by the warehouse and elevator men and remained in force for 13 years without reference to the farmers' interests and rights. On the contrary, the return to the writ (Rec. 7) recites the report of the Railroad and Warehouse Commission of the State of 1890, recommending the same charge of $2\frac{1}{2}$ cents per bushel, as theretofore made by the elevators, and declaring that the lesser rates fixed by the law of the State were "unreasonable."

On the one hand opposing counsel contend that the de-

mand for cars in the grain-moving season exceeds the supply, and hence the farmer must depend upon the local grain elevators and warehouses; and on the other hand he asserts that if this plaintiff in error had received the relator's wheat he would have at once shipped same to the grain market at Minneapolis or Duluth, and enjoyed the use of the money paid by the relator for storage, insurance, etc., as compensation "for the storage of wheat "never stored," and for insurance "of wheat never in- "sured for a day." These statements certainly cannot be harmonized.

X.

The plaintiff in error by his return (Rec. 5) avers that his principal business is that of a buyer of wheat for shipment and sale at Minneapolis and Duluth, and "to which "the business of storing grain for third persons is, and "always has been, a mere incident.

"That all grain purchased by respondent at his said "elevator is purchased for the sole purpose of being "shipped to and sold at and is shipped to and sold at "Minneapolis and Duluth, Minnesota.

"That respondent in the conduct of his said business "contracts with millers and other purchasers of grain at "said Minneapolis and Duluth to sell and deliver to said "persons at a future and fixed date certain quantities of "wheat, and operates and maintains his said elevator for "the exclusive purpose of purchasing grain to fill said "contracts.

"That in seasons when the grain yield is light and rail- "road facilities are such as to enable grain to be moved "rapidly, there is space and storage capacity in respond- "ent's elevator in excess of that used by respondent's "grain, and particularly when respondent's contracts for

" the sale of grain are small, while at other times when " the yield is enormous, as in the present year, respond- " ent's contracts large, and the quantities of grain pre- " sented for shipment are beyond the capacity of the " railroads to move, there is not sufficient storage capacity " in respondent's elevator to hold and store the grain pur- " chased by respondent in the conduct of his said busi- " ness."

These facts are admitted by the demurrer to this return (Rec. 26). They are indirectly challenged only by the statement of the relator's petition that when, on September 30, 1891, he tendered plaintiff in error his grain for storage, respondent then had in his elevator "storage " capacity for over 25,000 bushels of grain not in use and " wholly unoccupied."

But it is a fact of common knowledge that the grain threshing and moving season in this Northwestern wheat country extends from about September 15 to December 15 in each year. Conceding that on September 30, 1891, the respondent had this unoccupied space in his elevator, that fact is entirely consistent with his statement *supra*, that he had not in that season sufficient storage capacity in his elevator " to hold and store the grain purchased by " respondent in the conduct of his said business " and to fill his existing contracts.

The *purpose* for which respondent built his elevator and the *use* he declares he makes thereof being thus established, can the State declare that it *shall* be deemed and held a public elevator wherein respondent is *compelled* to store all grain belonging to others which may be offered to him for that purpose? In the Munn and Budd cases the elevators were admittedly used *solely* in the storage and transfer of grain. Here the statute of the State, if applicable to this plaintiff in error, at once *destroys*

his business, and makes the mere incident the controlling *use* to which he *must* apply his property. In the broadest, strongest, and clearest sense this is depriving this plaintiff in error of his liberty and property without due process of law, and is in the highest degree obnoxious to this Constitutional prohibition and guarantee. No argument can disprove it—no argument is needed to further demonstrate it. We only add the suggestion that if the State has power to divert the property of this plaintiff in error from the declared purpose for which he built and uses it, it has equal power to compel the farmer to sow all his land with wheat. It is the prime article of food. Its sufficient production is of the highest necessity; its transportation to the places of consumption is a subordinate incident thereto. In its production all the people have vital interest, and *hence* the farmer may with equal propriety be compelled to use *his* property to this paramount end. Concede that our illustration is absurd, yet the attempted application of the same principle to this plaintiff in error under the facts established by this record is in no less degree absurd.

XI.

It is assigned for error that the act of the State Legislature, here involved, by section 11 is in conflict with section 1 of the 14th amendment of the Federal Constitution "in so far as that section requires the plaintiff in "error to engage in the business of insuring property."

In *Munn* v. *Illinois* (94 U. S. 117) the charge imposed by the statute there involved was for "receiving and delivering * * "grain."

And in *Budd* v. *New York* (143 U. S. 517) the statute regulated "the charges for elevating, trimming, receiving,

" weighing, and discharging grain by means of floating " and stationary elevators and warehouses in this State."

The statute of North Dakota, here under review, provides (see page 70, original brief of plaintiff in error), in section 11, that—

" The charges for storage and handling grain shall not " be greater than the following schedule :

" For receiving, elevating, *insuring*, delivering, and " twenty days' storage, two cents per bushel. * * * *The* " *grain shall be kept insured at the expense of the ware-* " *houseman for the benefit of the owner.*"

This requirement goes far beyond the statutes heretofore construed by the Court in the cases *supra*. Whether the delivery to a warehouse, and receiving the customary receipt therefor, and where the grain is intermingled with that of others, becomes a bailment or a sale is not at all material here. The authorities differ widely upon this question. The statute seeks to impose the obligation upon the warehouseman to keep the grain thus stored insured at *his* expense and for the benefit of the owner of the grain. Even assuming that the warehouseman, as bailee, in responsible for the delivery of the property, it is certain that the bailment is for the mutual benefit of both parties, and the warehouseman can be held only " to an ordinary degree of diligence." Yet this statute compels him to insure the property at his own cost and then arbitrarily fixes the rate which he shall charge and receive for the storage, delivery, and insurance of the grain. If it had then proceeded to fix the rates of insurance which should be charged by underwriters therefor and for the benefit of the warehouseman, there might be (assuming such provision to be in the exercise of lawful legislative power) some justification for thus arbitrarily

limiting the warehouseman's charges for the gross service of storing, delivering, and *insuring*. But as the cost of insurance is a matter resting wholly within the control of the underwriters and is not sought to be regulated by the State, and the rate is constantly changing, it is impossible to affirm that the State can thus arbitrarily compel the warehouseman to carry insurance at an unknown cost and yet to charge therefor a fixed statutory rate. This element of the statute is obnoxious on every ground and *per se* stamps it as an unauthorized exercise of legislative power in direct contravention of the fundamental law.

If it is possible to hold in this case that, as matter of sound law, the State may regulate the charges to be made by this plaintiff in error for the services performed within his control, such as storing and delivering the grain, it cannot be contended that the State can arbitrarily compel the plaintiff in error to assume an obligation in the matter of insurance and to pay therefor when the service involved in such insurance and the cost thereof is wholly beyond his control. It cannot be suggested that the State may regulate the charges imposed by the insurance companies, nor attempt to legislate upon contracts between the underwriter and the insured in this respect, and yet this necessary exercise of concomitant power for the protection of the plaintiff in error must be supplied before it is possible to hold that this statute, in compelling the insurance of the grain, is, as against this plaintiff in error, an exercise of Constitutional power. In such view it is a direct attack upon his Constitutional protection. It does deprive him of his liberty and property without due process of law. If compelled on the one hand to thus insure the grain kept in storage in his warehouse, and on the other hand being left at the untrammelled dictation of the underwriters as to the rate of charge which shall be paid